TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 87

BOB WHITE, PETITIONER,

vs.

THE STATE OF TEXAS

WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JUNE 6, 1939.

CERTIORARI GRANTED MARCH 25, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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BOB WHITE, PETITIONER,

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THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 26, 1940.

—7655

[fol. a]

IN DISTRICT COURT OF MONTGOMERY COUNTY

CAPTION

At a term of the District Court, begun and holden at Conroe, within and for the County of Montgomery, on the 25th, day of July, A. D. 1938, before the Honorable W. B. Browder, and ending on the 3rd, day of September, A. D. 1938, the following case came on for trial, to-wit:

No. 8208

THE STATE OF TEXAS

vs.

BOB WHITE

[fol. 1] IN DISTRICT COURT OF MONTGOMERY COUNTY

INDICTMENT—Filed July 7, 1938

In the name and by authority of the State of Texas:

The Grand Jurors, for the county of Polk, State aforesaid, duly organized as such at the August Special Term, A. D. 1937 of the 9th District Court for said County, upon their oaths in said Court present that Bob White on or about the 10 day of August A. D. one thousand nine hundred and thirty-seven and anterior to the presentment of this Indictment, in the County of Polk and State of Texas, did then and there unlawfully in and upon Mrs. Ruby Cochran, a woman, did make an assault; and did then and there, by force, threats and fraud, and without the consent of the said Mrs. Ruby Cochran, ravish and have carnal knowledge of the said Mrs. Ruby Cochran, against the peace and dignity of the State.

M. J. Taylor, Jr., foreman of the Grand Jury.

Endorsed: Names of witnesses: Mrs. Ruby Cochran, William McGowen, Milton Thomas, Judie Thomas, Bettie Lee Thomas, Alma Thomas, Aubry Riley, R. D. Holliday, Dr. Sol Bergman, Mrs. Katie McCormick, Cecil Priest. No. 8208, No. 7188, the State of Texas vs. Bob White. Indict-

ment. Offense rape. W. C. McClain Dist. Attorney. A True Bill, M. J. Taylor, Jr. Foreman of Grand Jury. Filed 23 day of August, 1937. A. L. Reaves, District Clerk. We the Jury find the defendant Bob White guilty as charged in the indictment and assess his punishment at death. J. E. Pursley.

Foreman.

[File endorsement omitted.]

[fol. 2] In District Court of Montgomery County

[Title omitted]

Order Re-issuance of Process—July 7, 1938

It is the Order and Judgment of this Court that the Clerk of this Court, upon an application made by either the State or Defense, that all witnesses requested be re-issued for. It is the order that upon the filing of said application for witnesses heretofore subpoenaed, or any additional witnesses, that process be immediately issued and directed to the proper authorities in the Counties where said witnesses are supposed to reside.

W. B. Browder, Judge of the 9th District Court of Montgomery County, Texas.

[fol. 3] In District Court of Montgomery County

[Title omitted]

Defendant's First Application to Quash the Special Venire—Filed August 2, 1938

To the Honorable District Court and Judge thereof:

Bob White, the above named defendant, comes now and respectfully represents to this Court that he is a member of the colored race, a person of African descent, a negro, and by and through his Attorney of Record respectfully moves this Court for an order quashing the Special Venire list, from which a jury is to be impanneled to try the issues raised on said defendant's plea of not guilty to the indictment returned into the District Court of Polk County, Texas, by the Grand Jury in and for the body of the County of Polk County, Texas, on or about August 23rd, 1937, at a purported special term of said Court, wherein and

whereby said defendant is indicted and charged with the offense of rape upon a white woman named Ruby Cochran; this motion to quash being offered on the grounds and for the reasons set forth in the hereto attached affidavit of this defendant, which affidavit here and now is made a continuing part of this paragraph and Motion and to which affidavit reference hereby is made for all purposes whatsoever, the same as if here now haec verba set forth, to-wit: the affidavit hereto attached, marked and entitled "Exhibit A". This defendant further moves this Court to quash the present special venire for the reason that the same was not called, served and returned as provided by law; because the correct post office addresses, or their respective addresses of each special venireman do not appear upon the list thereof furnished the defendant and, this defendant not being familiar with the names and addresses of Montgomery County, Texas is not able to locate any member of said jury or to properly learn who said juror is as is contemplated by law in the requiring that a copy of such list be furnished to the defendant; because only one hundred [fol. 4] talesmen or special veniremen have been selected or called all of which may, and most likely will result in an exhaustion of the special venire as listed to this defendant and thus will enable the hand-picking of additional veniremen without any opportunity on the part of this defendant to learn or know anything about the character of the persons selected as supplemental special veniremen in this cause, and for these reasons says the list of names furnished him for special veniremen is not sufficient and should be quashed.

Wherefore, this defendant prays that the special venire in this cause as set for trial on August 2nd, A. D. 1938 be quashed.

J. P. Rogers, Attorney for Defendant.

Exhibit "A" to Application to Quash

In District Court of Montgomery County

[Title omitted]

To the Honorable District Court and Judge thereof:

Bob White, to me known and known by me to be the person whose name is subscribed hereto as affiant, on this the first day of August, A. D. 1938, personally appeared

before me, Lester K. McGuire, District Clerk in and for Montgomery County, Texas, and, he, the said Bob White being by me first duly sworn upon his oath did depose and say:

My name is Bob White. I am the defendant in what was Cause No. 7188 entitled The State of Texas vs. Bob White, entered upon the docket of the District Court of Polk County, Texas, and which by change of venue from said Polk County, Texas to Montgomery County, Texas, now is Cause No. 8208 in and upon the docket of the District Court and/or the Special District Court of Montgomery County, Texas, and entitled as stated; that on or about the 20th day of August, 1937 I was indicted for a capital offense, said indictment charging that I, Bob White, a person of the colored race and of African descent and who is a negro, had [fol. 5] committed a capital offense against the peace and dignity of the State of Texas, to-wit: the act of rape upon the person of Mrs. Ruby Cochran, a woman of the white race, and of Caucasian descent.

That under said change of venue said cause now is set for trial in said Montgomery County, Texas on the 2nd day of August, A. D. 1938 and for which a special venire of jurors or tal-smen is purported to have been selected under the provisions of Section 2 of Title 8 of the Code of Criminal Procedure of the State of Texas, Revision of 1925 and as more specially provided in Article 587 thereof, to-wit:

"Article 587 'Special Venire' "

A "Special venire" is a writ issued in a capital case by order of the district court, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court may order, to appear before the court on a day named in the writ; from whom the jury for the trial of such case is to be selected."

In addition thereto Article 591 thereof provides as follows:

"Art. 591. Drawing from wheel

"In all counties having therein a city of twenty thousand or more population as shown by the preceding Federal census, whenever a special venire is ordered, the district clerk, in the presence and under the direction of the judge, shall draw from the wheel containing the names of the

jurors the number of names required for such special venire, and prepare a list of such names in the order in which drawn from the wheel, and attach such list to the writ and deliver same to the sheriff. The cards containing such names shall be sealed in an envelope and retained by the clerk for distribution, as herein provided. If from the names so drawn, any of the men are impaneled on the jury and serve as many as four days, the cards containing their names shall be put by the clerk in the box provided for that purpose, and the cards containing the names of the men not impaneled shall again be placed by the clerk in the wheel containing the names of eligible jurors. (Acts 1907, p. 271; Acts 1911 p. 150)."

[fol. 6] Regardless of which provision was had for the purpose of obtaining the aforesaid special venire, that is the special venire from which trial jurors are to be selected to pass upon the facts adduced and therefrom determine whether or not this defendant is guilty of the offense and whether or not his life should be taken therefor, this defendant says that the laws of the State of Texas and the provisions of the Constitution of the State of Texas and the Constitution of the United States of America have not been followed and have in fact been violated in that no person selected upon said special venire is of the race, color or descent of this defendant, and that such have been excluded wholly and solely because of their race, color and descent and not because they are in any manner disqualified to act as trial jurors in the cause wherein I am defendant, said trial jury being required to try the issues in the present case upon this defendant's plea of not guilty to the aforesaid indictment.

This defendant is informed and verily believes that if said special venire was selected by the names being drawn from the jury wheel, then, either all of the names originally placed in said wheel were solely of white persons, or, if any of the colored race were designated by names in said jury wheel, then, such names were discarded if, as and when drawn from said jury wheel in the instant case. All to the same effect, to-wit that none but white persons constitute the special venire from which the trial jury is to be selected in the instant case.

That in Montgomery County, Texas, long prior to the present time and occasion of the selection of said special venire there had been, were and still are numerous negro

citizens of the State of Texas and residents of said County who, in every respect had been, were and still are qualified to serve as petit jurors in civil and criminal trials in said Court, including the trials of felonies which involve the death penalty and capital punishment; however, in the selection of said current jury list aforesaid and in supplementing the same from time to time, unlawfully and in violation of [fol. 7] their respective oaths of office of the Constitution of the State of Texas, of the Constitution of the United States of America and of the law of the land there was excluded from said special venire list, supplement and supplements thereto; all qualified negroes, members of the colored race and of African descent, solely on account of their color and race.

That at all times material herein it has been, was and still is the custom in said Montgomery County, Texas to use white men exclusively for petit jurors to serve in any and all cases, including trials of felonies where the death penalty or capital punishment are involved, and in selecting the current special venire list and the supplement and supplements thereto, said custom was followed and thereby there was excluded from said list any and all qualified negroes from said list, supplement and supplements thereto, solely on account of their color and race, and, therefore there could not be, and are not, any negroes on said special venire drawn and selected as aforesaid, and in so far as the trial jurors as may be selected from said panel all qualified negroes have been and are unlawfully excluded from the possibility of sitting as jurors on the trial of the issues raised on the indictment herein, solely by reason of their color and race. That if there are any negroes now upon said special venire list only such a small number has been placed thereon as will enable the State of Texas to strike all of such in their peremptory challenges and thus prevent any qualified negro from becoming a member of the trial jury, all of which brings about the same result, to-wit: the unlawful denial of this defendant to a trial by a jury whereon it is possible for a person of his race to qualify and be admitted and seated to pass upon the issues raised upon the indictment and this defendant's plea of not guilty to the indictment aforesaid, all solely by reason of their color and race. That all of the proceedings had in connection with the selection of said special venire, that is all records concerning same, which are a part of the records of this

[fol. 8] Court and in the possession of this Court hereby and now are referred to, together with all file marks thereon for all purposes whatsoever and it is prayed that the same be read and considered as a part of this Motion to the same effect as if copied at length herein, that is, all of the same hereby and now are referred to as a continuing part of this paragraph and here now referred to and made a part hereof, the same as if now haec verba set forth herein, and reference is also made to the list of the members of the special venire, from which said trial jury must be selected unless this motion is sustained, and same likewise hereby is made a part hereof for all purposes whatsoever, the same as if here now haec verba set forth. That by reason of the unlawful exclusion of all qualified negroes from the current jury list aforesaid, supplement and supplements thereto, the defendant herein, a negro, has been greatly prejudiced and has been denied due process and equal protection of the law in violation of the Constitution of the State of Texas and of the Constitution of the United States of America and the law of the State of Texas and of the land.

Bob (his X mark) White.

THE STATE OF TEXAS,
County of Montgomery:

Subscribed and sworn to before me this the 2nd day of August, A. D. 1938, to certify which witness my hand and seal of office.

(Seal) Lester K. McGuire, District Clerk in and for Montgomery County, Texas.

IN DISTRICT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEFENDANT'S FIRST APPLICATION TO QUASH INDICTMENT—
Filed August 2, 1938

To the Honorable District Court and Judge thereof:

Bob White, the above named defendant, comes now and [fol. 9] respectfully represents to this court that he is a member of the colored race, a person of African descent, a

negro, and by and through his Attorney of Record respectfully moves this Court for an order quashing the indictment returned into the District Court of Polk County, Texas by the Grand Jury in and for the body of the County of Polk County, Texas, on or about August 23rd, 1937 at a purported special term of said Court, wherein and whereby said defendant is indicted and charged with the offense of rape upon a white woman named Ruby Cochran; this motion to quash being offered on the grounds and for the reasons set forth in the hereto attached affidavit of this defendant; which affidavit here and now is made a continuing part of this paragraph and Motion and to which affidavit reference hereby is made for all purposes whatsoever, the same as if here now hacc verba set forth, to-wit: the affidavit hereto attached marked and entitled "Exhibit A".

Further, because said indictment was not found and returned at a legal term of this District Court of Polk County, Texas or any legal Special Term thereof, in as much as a regular term of the Ninth Judicial District Court of Texas then was in session in the County of Montgomery, Texas, the same being one of the counties in the said Ninth Judicial District, and that calling of a special grand jury in Polk County, Texas in this matter caused two separate and distinct sessions of said Court to exist at one and the same time within the same district.

Wherefore, he, the said defendant prays that said indictment be quashed.

J. P. Rogers, Attorney for Defendant.

EXHIBIT "A" TO APPLICATION TO QUASH

IN DISTRICT COURT OF MONTGOMERY COUNTY

[Title omitted]

To the Honorable District Court and Judge thereof:

[fol. 10] Bob White, to me known and by me known to be the person whose name is subscribed hereto as affiant, on this the 1st day of August, A. D. 1938, personally appeared before me, Lester K. McGuire, District Clerk in and for Montgomery County, Texas, and he, the said Bob White, being first duly sworn by me, upon his oath did depose and say:

My name is Bob White, I am the defendant in what was Cause No. 7188 in and upon the docket of the District Court of Polk County, Texas and entitled The State of Texas versus Bob White, and which, by change of venue from said Polk County, Texas to said Montgomery County, Texas, now is Cause No. 8208 in and upon the docket of the District Court and/or Special District Court of Montgomery County, Texas, and entitled as above stated; on or about the 20th day of August A. D. *1927* I was indicted by what purported to be a quorum of what purported to be the Grand Jury of Polk County, Texas for what purported to be a special term of the District Court of Polk County, Texas, in and of the Ninth Judicial District, the said indictment charging that I, Bob White, a person of the colored race and of African descent and who am a Negro, had committed a capital offense against the peace and dignity of the State of Texas, to-wit the act of rape upon the person of Mrs. Ruby Cochran, a woman of the white race and of Caucasian descent.

That under Title 7 of the Code of Criminal procedure of the State of Texas, Revision of 1925, under Article 333 to 338, both inclusive, provision is made as to the selection of jury commissioners, that is, Article 333 of Chapter 1 of said Title provides:

"The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

"1. Be intelligent citizens of the county and able to read and write.

"2. Be qualified jurors and freeholders in the county.

"3. Be residents of different portions of the county.

"4. Have no suit in said court which requires the intervention of a jury."

[fol. 11] That Article 338 thereof provides:

"The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court."

Article 348 of said Chapter 1 of said Title 7, as amended by the acts of 1933 Forty-third Legislature, page 56 Chap-

ter 27, making provision concerning the failure to select and summon the grand jury as above directed, is as follows:

"If there should be a failure from any cause to select and summon a grand jury, as herein directed, or, when none of those summoned shall attend, the district court shall, on the first day of the organization thereof, direct a writ to be issued to the sheriff, commanding him to summon any number of persons, not less than twelve nor more than sixteen, to serve as grand jurors."

The qualifications of grand jurors is provided for in Article 339 of said Chapter 1 of said Title 7:

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes cannot be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

That nowhere in the provisions of the laws of Texas, nor [fol. 12] within the constitution of the State of Texas, nor within the constitution of the United States of America is there any provision requiring that such jury commissioners be selected only from white tax payers or from white citizens, freeholders, or householders, but on the contrary, such laws and constitutions making every citizen of the State of Texas as above described eligible as jury commissioners and also as grand jurors, including citizens of Polk County, Texas, whereas each and every one of the jury commis-

sioners, if any, used in selecting the grand jury which returned said indictment, were of the Caucasian race, to the total exclusion of any member of the colored race of of African descent; likewise said grand jury was selected to the total exclusion of any member of the race to which the defendant belonged, in spite of the provision of Article 354 of said Chapter and Title as to the testing of the qualifications of any person to serve as a grand juror, and also in spite of the other provisions of Chapter 1 of Title 7, the provisions of said Article 354 being as follows:

"In trying the qualifications of any person to serve as a grand juror, he shall be asked:

"1. Are you a citizen of this State and county, and qualified to vote in this county, under the Constitution and laws of this State?

"2. Are you a freeholder in this State or a householder in this county?

"3. Are you able to read and write?"

That a careful examination of the list of citizens of the State of Texas and of the County of Polk and of the freeholders within the State or the householders within said county, who must be of sound mind and good moral character and be able to read and write and not to have been convicted of any felony and not to be under indictment or other legal accusation for theft or any felony, reveals many members of the colored race and of African descent or who is a negro or member of the same race as the defendant, Bob White.

[fol. 13] That the Honorable W. B. Browder, judge of said District Court, never considered or selected any of such eligible members of the race to which the defendant belongs, for service as the jury ~~commissioners who~~ were selected and served to select the grand jury which indicted the defendant, and the said Commissioners and judge never considered or selected any of the members of the race of the defendant to serve upon the grand jury which returned the indictment against said defendant, and such failure in connection with said jury commissioners and said grand jurors was wholly and solely on account of their race and color and not because every member of their race within Polk County, Texas were disqualified for any reason under

the laws of the State of Texas, there being, in fact, many members of the race of the defendant who are fully qualified to be jury commissioners and grand jurors in Polk County, Texas, more especially the jury commission and grand jury herein mentioned.

That it is a custom in Polk County, Texas to use white men exclusively for jury commissioners or for grand jury service and to exclude therefrom qualified negroes or persons of African descent solely on account of their race and color; that all processes which issued in connection therewith was done with the express purpose of excluding negroes from the said commission and grand jury, and that by reason of the unlawful exclusion of qualified negroes from the said commission and the said grand jury list, no negroes were on the venire from which said grand jury was selected and no negroes therefore were permitted to serve or even enabled to serve on the grand jury returning the indictment as aforesaid, because said grand jury venire was composed exclusively of white male citizens, to the great prejudice and detriment and illegal indicting of the defendant, Bob White, who, as aforesaid, is a Negro, a person of the colored race and of African descent.

his
Bob × White.
mark

[fol. 14] The State of Texas,
County of Montgomery:

Subscribed and sworn to before me this 2nd, day of August A. D., 1938.

(Lester K. McGuire, District Clerk, in and for Montgomery County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 15] In District Court of Montgomery County

[Title omitted]

Answer to Motions to Quash—Filed Aug. 2, 1938

Comes now the State through its attorneys, and would show the Court that the Motions herein filed on this the 2nd day of August, A. D. 1938, should be in all things over-

ruled and not considered by this Court, in that all Motions, Special Pleas and Exceptions which have been filed herein and were to be determined by the Judge have heretofore been overruled, and the Defendant plead to the indictment and entered his plea of "not guilty" at the time the venue of the case was changed from Polk County to Montgomery County, Texas.

Subject to the exception heretofore urged, the State denies each and every allegation in said Motion contained and says the same are not true in whole or in part.

Wherefore, the State prays that said Motions be in all things overruled.

The State of Texas, by W. C. McClain, Dist. Atty., 9th Judicial District of Texas.

Duly sworn to by W. C. McClain. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 16] In District Court of Montgomery County

[Title omitted]

Charge to Jury—Filed Aug. 4, 1938

Gentlemen of the Jury:

The defendant stands charged by indictment with the offense of rape of one Mrs. Ruby Cochran, a woman, alleged to have been committed in the County of Polk and State of Texas, on or about the 10th day of August 1937. To this charge the defendant has pleaded "not guilty.".

Rape is the carnal knowledge of a woman without her consent, obtained by force, threats or fraud, or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent, and with or without use of force, threats, or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of eighteen years other than the wife of the person with or

without her consent and with or without the use of force threats or fraud.

In this case the indictment charges a rape by force, and I charge you that force, within the meaning of this statute, is defined as follows: To constitute rape by force the accused must have ravished the alleged injured female by having carnal knowledge of her without her consent and against her will by force, and the force used must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case, and penetration of the sexual organ of the female alleged to have been ravished, by the male organ of the accused must be proved beyond a reasonable doubt.

[fol. 17] The penalty prescribed by statute for the offense of rape is death, or confinement in the penitentiary for life or for any term of years not less than five.

Accordingly, you are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant did, as charged in the indictment, on or about the 10th day of August 1937, in the County of Polk and State of Texas, make an assault in and upon the said Mrs. Ruby Cochran, a woman, and did then and there by force, violently ravish and have carnal knowledge of her, the said Mrs. Ruby Cochran, without her consent and against her will, you will find the defendant guilty as charged, and assess his punishment at death, or by confinement in the penitentiary for life, or for any term of years not less than five.

You are further instructed that a confession of a defendant, in order to be admissible in evidence against him, must be shown by the evidence to have been freely and voluntarily made, without compulsion or persuasion, and in regard to the alleged confession of the defendant offered in evidence by the State and permitted to go to the jury, you are instructed that before you can consider the same as any evidence against the defendant, the State must show that the defendant was warned by the officer taking the same: (1) That he, the defendant, did not have to make any statement at all; (2) That any statement made by him, the defendant, may and could be used in evidence against him on a trial for the offense concerning which it was made. So in this case, if you believe from the evidence that the officer taking such confession, did not warn the defendant,

that he did not have to make any statement at all, and did not warn him, that any statement he might make could be used as evidence against him, on a trial for the offense concerning which it was made, or if you believe from the evidence that such confession was not freely and voluntarily made, or if you believe the same was induced by duress, threats, coercion, fear, fraud, or by persuasion, or by promise of immunity, or through any other improper influence, or if you have a reasonable doubt as to whether [fol. 18] he was warned by the officer taking such confession, or as to whether it was freely and voluntarily made, or as to whether it was induced by duress, threats, coercion, fear, fraud, or by persuasion, or promise of immunity, or through any other improper influence, then you will wholly disregard such confession and consider it for no purpose whatever, and draw no inferences nor conclusions therefrom, and acquit the defendant, unless you believe from the other evidence in the case, if any, beyond a reasonable doubt, that the defendant's guilt has been established of the offense charged in the indictment. You are further charged that if from the evidence you believe that the confession introduced herein was not a voluntary confession, as that term has hereinbefore been defined, then, and in that event the State relies on circumstantial evidence for a conviction.

And the Court further charges you that in order to warrant a conviction of a crime on circumstantial evidence, each fact, necessary to the conclusion sought to be established, must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such cases it is not sufficient that the circumstances coincide with, account for and therefore render probable, the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis, except the defendant's guilt and unless they do so, beyond a reasonable doubt, you will find the defendant not guilty.

[fol. 19] Among other defenses set up by the defendant

is what is known as an alibi; that is, that if the offense was committed, as alleged, that the defendant was, at the time of the commission thereof, at another and different place from that at which such offense was committed, and therefore was not and could not have been the person who committed the same.

Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed (if committed) at the time of the commission thereof, you will find him "not guilty."

In all criminal cases the burden of proof is on the State. The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt you "will acquit him, and say by your verdict "not guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

W. B. Browder, District Judge, 9th Judicial District Court of Montgomery County, Texas.

[File endorsement omitted.]

[fol. 20] In District Court of Montgomery County, Ninth Judicial District

No. 8208

The State of Texas

vs.

Bob White

Verdict and Judgment—August 5, 1938

This day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant Bob White appeared in person, his counsel also being present, and both parties announced ready for trial, and the Defendant Bob White in open Court pleaded "Not Guilty" to the

charge contained in the indictment herein; thereupon a jury, to-wit: J. E. Pursley and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the Minutes of the Court, to-wit:

We the Jury find the Defendant Bob White guilty as charged in the indictment and assess his punishment at death.

J. E. Pursley, Foreman.

It is therefore considered and adjudged by the Court, that the Defendant, Bob White, is guilty of the offense of Rape as found by the jury, and that he be punished, as has been determined by the jury, by death, and that the State of Texas do have and recover of the said Defendant Bob White all costs in this prosecution expended, for which execution will issue; and that said Defendant is remanded to jail to await the further order of the Court herein.

[fol. 21] In District Court of Montgomery County

[Title omitted]

First Amended Motion for New Trial—Filed August 22, 1938

To the Said Honorable Court and the Judge Thereof:

Bob White comes now as the defendant in the above entitled and numbered cause, and, under due leave thereunto first had and obtained from the Court, files within trial term time this his First Amended Motion for a New Trial, same being in lieu of his Original Motion therefor and which was duly filed on August 5, A. D., 1938, after verdict, in this cause, and hereby respectfully moves the Court to set aside the verdict of the jury herein, and the judgment of the Court

thereon rendered against him on said August 5, A. D., 1938 and to grant him a new trial for and because of the hereinafter set forth material errors, reasons, or causes, to-wit:

1. The verdict of the jury herein is contrary to the evidence submitted to the jury.

2. The verdict of the jury herein is not supported by legal proof offered by the State.

3. The judgment is contrary to the law governing this cause.

4. The judgment is not supported by the law governing this cause.

5. He has been deprived of a fair and an impartial trial herein by reason of the Court overruling his motion, filed on said August 5, A. D., 1938, in due time or before announcing ready for trial herein to quash the indictment against him herein, reference to said motion hereby being made for all purposes whatsoever, the same as if here haec verba set forth, and being hereto attached as a continuing part of this paragraph, marked and entitled "Exhibit 2A".

6. He has been deprived of a fair and an impartial trial herein by reason of the Court overruling his motion, filed on said August 5, A. D., 1938, in due time or before announcing ready for trial herein to quash the special venire called to try him herein, reference to said motion hereby being made for all purposes whatsoever, the same as if here haec [fol. 22] verba set forth, and being hereto attached as a continuing part of this paragraph, marked and entitled "Exhibit 2B".

7. The Court erred in permitting the State to file a purported answer to said motion to quash said indictment after the Court had acted on said motion and had overruled the same, especially in that defense counsel did not agree to permit the State to thus file its answer.

8. The court erred in permitting the State to file a purported answer to said motion to quash the special venire after the Court had acted on said motion and had overruled the same, especially in that defense counsel did not agree to permit the State to thus file its answer.

9. The Court erred in permitting the State to offer in evidence the purported written confession of the Defendant for the following reasons:

a. It was not a voluntary confession and was made under duress, and the Defendant could not read or write and did not understand what he was signing if he did sign said statement.

b. The same was secured while the Defendant was under arrest, was not given the statutory warning, and was under coercion as several officers were present at the time, some of whom had just prior to this taken Defendant out of jail and into the woods, chained him to a tree, gave him a severe beating and threatened to kill him unless he made a confession, and that the Defendant was suffering at the time from said injuries recently inflicted.

c. Said confession was dictated by Mr. Foreman, a special prosecutor in this case, and was written by Ernest Coker, County Attorney of Polk County, both men who are and were highly prejudiced against Defendant, and seeking his conviction.

d. This Defendant is an ignorant negro, can neither read nor write, and said instrument shows very clearly that he did, not and could not, possibly have dictated the same.

e. Promises were made at the time to induce Defendant to make a confession; that the same was not voluntary and was not made by Defendant but by Mr. Foreman, who dictated same.

[fol. 23] f. Said confession shows on its face that it was not a voluntary statement of the Defendant, and was made in answer to questions propounded to him by attorneys and officers, is not a part of the res-gestae, and should not have been admitted in this case.

g. Defendant was not permitted to talk to an attorney to advise him but was kept incommunicado, was not permitted to use a telephone, was kept in the woods by rangers a great portion of the time and was denied every right that even this Defendant is entitled to under the Constitution of Texas and the Constitution of the United States.

h. The officers taking said statement had already gone to the Cochran home, to the home of Defendant and were familiar with the road and surroundings between said places, and the things therein set forth as coming from the mind of the Defendant were in fact from the minds of those

present who prepared and those who assisted in preparing said statement.

i. At the time of the arrest of the Defendant he was arrested without warrant or cause other than a mere supposition, and said arrest was illegal, and anything contained in said purported confession concerning the same thus could not be made legal evidence and thus was improperly admitted as evidence.

j. The information therein set forth was obtained by an illegal invasion of the home of the Defendant into which entry was made without legal search warrant and from which property of the Defendant then and there was taken without legal process for such purpose, the same being taken during the time of such illegal invasion and entry, and any statement in said purported confession concerning such property so obtained cannot thus be made *be made* legal evidence and thus was improperly admitted as evidence.

k. There is no legal corroboration of said purported confession upon any material matter.

[fol. 24] l. There is no identification of the Defendant as the person who committed the offense other than that contained in said purported statement, which statement was obtained after at least one week of mental and physical coercion and fraudulent persuasion in a strange community under the influence of the presence of officers who testified that they had taken the Defendant from jail during the period in between the time of his arrest and the time of making his confession, and at such times had taken him down the road and off the road and into the woods so many times the number thereof could not be remembered, and in this connection the prosecutrix did in the slightest manner identify the Defendant.

The State relied for a conviction solely on the confession of this Defendant which was not a voluntary confession, does not meet the requirements of the statute, was made in a strange place, under coercion and persuasion, and should not have been admitted, especially because of the aforesaid reasons.

10. The making and permitting remarks of several of State's counsel when the Defendant Bob White was on the witness stand on direct examination, among these being:

a. Mr. Campbell: "We want to know who 'they' are."

b. Mr. Foreman: "It might have been John D. Rockefeller."

c. The Court: "I will ask you to prove who 'they' were."

d. Mr. Pitts: "He said it was a Texas Ranger."

These remarks were made in the presence and hearing of the jury by the Court and States counsel and were all excepted to at the time, but the Court did not instruct the jury not to consider same which remarks of counsel and the Court would naturally tend to prejudice the minds of the jurors against the Defendant.

11. In permitting counsel for the State on cross-examination of Bob White to ask the witness numerous questions as to what he testified to at a former trial in which counsel used the statement of facts in the narrative form, not showing the questions that were asked, nor the answers as given at the former trial, the form used being solely and only the construction of the reporter.

[fol. 25] 12. In withdrawing from the jury the answer of the Defendant to this question by Defendant's counsel, especially as a predicate. "Bob, at the time you were in Beaumont, did Mr. Foreman tell you anything about having been on the ground and other places and your place? Did he tell you that? Answer—"yes."

This testimony was clearly admissible because the undisputed facts show that Foreman was present when the statement was written and it is Defendant's contention that he made investigations, part of which was said illegal entry, and upon which he dictated the confession or a part of it, and this evidence should have been admitted and it is very material as to a vital issue in the case and should not have been withdrawn. And further, defendant insists that the action of the Court in instructing the jury not to consider said answer was very harmful to the rights of this Defendant. The main issue in this case is whether or not the statement offered in evidence was a voluntary statement, and the Defendant certainly was entitled to show any fact that would throw any light on this issue and lay predicate for further enlightenment on Foreman's pre-confession conduct.

13. The Court erred in sustaining the States objection to this question asked the witness Bob White by his counsel:

"Had you recently been injured?" Answer—"Yes, sir."

Objection was made by Mr. Pitts as being leading and suggestive and he was by the Court sustained. Exception was taken to the ruling at the time. The issue in this case as to the statement offered in evidence by the State is—was it a voluntary statement or not. To ask the defendant, "Had you recently been injured?" We contend is not leading and the Defendant was entitled to have this issue submitted to the jury with the evidence he had to offer supporting his contention. The Defendant in this case is an ignorant negro, unable to read or write, and he contends that under these circumstances, this would not be a leading question, as if he had received an injury just prior to the time this statement was written the jury should know it, especially as effecting his mental condition and as predicate for *for* further like evidence.

[fol. 26] 14. Private prosecutor Z. L. Foreman, in his argument to the jury, made this statement:

"It doesn't make any difference to Mr. Johnson and Mr. Rogers what happened to Mr. Cochran. As far as they are concerned their innocent negro should be turned loose."

These remarks involving defense counsel were highly inflammatory and were not borne out by the record, and to which timely objection was made, although the Court instructed the jury not to consider such remarks, their harmful effect had already reached the jury and could not be removed.

15. Z. L. Foreman, in his argument in this case, used this language: "I don't believe Ernest Coker would have thought of it: I don't believe Appling would have thought of it: I don't know I would have thought of it."

This and other remarks of counsel were objected to because counsel was entirely outside the record and although counsel was admonished by the Court to stay in the record the harm had already been done, and such remarks were not withdrawn from consideration by the jury.

16. Regardless of many admonitions from the Court to Mr. Foreman to stay within the record, Mr. Foreman per-

sisted in making other material statements to the jury of facts not borne out by the evidence, including this statement:

"I have ssen Holliday in lots of situations where I thought he would never work it out, but he did work out of it. I have never seen a sheriff with as much perseverance; willing to go at any time and help the solution of crime in any jurisdiction. He has been there. He has never had one yet he did not solve. I happen to know about him for I worked with him for ten straight years." We submit that the foregoing remarks are clearly outside the record and counsel here has given evidence to the jury of facts not testified to by any witness, and while the Court instructed the jury not to consider these remarks counsel had already testified inhabitual continuity in his argument to facts not theretofore disclosed by any evidence.

[fols. 27-32] 17. After the State had rested and closed its case, the Court permitted the State to reopen its case and return the prosecutrix to the stand to testify for the first time that the person who assaulted her was a negro, that is, a person of the same race as the Defendant.

18. This Defendant says, that he has been deprived of a fair and impartial trial herein by reason of unfair and unjust treatment toward him, while on the witness stand testifying in his own behalf by the Private Prosecution, in this that while he was on the witness Stand the private prosecution, Mr. Foreman, was permitted, over the objections of the Attorneys for this Defendant, to stand near the Defendant, show him certain extracts from a purported Confession, after said Special Prosecutor had been informed that this Defendant could not read or write, and many other like acts on part of said Private Prosecution, all of which was objected to by the Attorneys for this Defendant.

Wherefore, because of the foregoing errors, reasons, and causes, this Defendant was denied a fair and an impartial trial, and he prays the Court that the verdict of the jury, and the judgment of the Court thereon in this cause, be set aside, and that he be granted a new trial.

J. P. Rogers, S. F. Hill, W. Jay Johnson, Attorneys for Defendant, Bob White.

Exhibit "2-A" to motion omitted. Printed side page. 3, ante.

[fols. 33-37] Exhibit "2B" to motion omitted. Printed side page. 8, ante.

[fol. 38] [File endorsement omitted.]

[fol. 39] IN DISTRICT COURT OF MONTGOMERY COUNTY.

[Title omitted]

ANSWER TO DEFENDANT'S MOTION FOR A NEW TRIAL—Filed August 26, 1938

To the Honorable Judge of Said Court:

Comes now the State of Texas, through its District Attorney, and takes issue with the defendant for the matters set up in his First Amended Motion For a New Trial filed herein on August 22, 1938, and denies each and every allegation as set out therein and demands strict proof of same.

The State specially excepts to paragraphs 5 and 6 in so far as complaint is made of the Court's overruling the Motion to Quash the Indictment, for the reason that no negroes were selected on the grand jury that returned said indictment. The State would show the Court that said Motion to Quash was not timely, in that said Motion to Quash the Indictment should have been filed, heard and determined before a change of venue was had from Polk County, Texas to Montgomery County, Texas. That there was no such motion filed before the change of venue was had, but the said motion was filed on the date that said cause proceeded to trial. That said motion was in no way supported by any testimony, and counsel after having filed said Motion stated in response to an inquiry made by the Court that they did not care to offer any testimony, and none was offered.

Wherefore, the State prays the Court that said Motion be in all things overruled.

W. C. McClain, District Attorney, Ninth Judicial District of Texas.

[File endorsement omitted.]

[fol. 40] IN DISTRICT COURT OF MONTGOMERY COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—August 26, 1938

On this day came on to be heard the motion of the Defendant, Bob White, to set aside the verdict and judgment herein rendered and grant him a new trial of this cause, and the State being present in Court by her District Attorney, and the Defendant, Bob White being present in Court in person, and the Court having heard the said motion and the evidence thereon submitted, is of the opinion that the same should be overruled.

It is therefore considered, ordered and adjudged by the Court that the said motion for a new trial herein be and the same is overruled, to which Defendant excepts and in open court gives notice of appeal to the Court of Criminal Appeals at Austin, Texas, and 30 days allowed from adjournment of this Court within which to file Bills of Exception & Statement of Facts.

[fol. 41] IN DISTRICT COURT OF MONTGOMERY COUNTY

[Title omitted]

PAUPER'S OATH FOR STATEMENT OF FACTS—Filed Aug. 26, 1938

To the Honorable W. B. Browder, Judge Presiding:

Now comes Bob White, the above named Defendant, in said entitled and numbered cause, and whom being duly sworn says, that I was convicted of crime at Conroe, Montgomery County, Texas, by a jury who returned a verdict assessing my punishment at death, from which it is my desire to appeal and further says, I am a poor person, I have no money or property with which to pay for the Statement of Facts, and that because of my poverty I cannot obtain the money to pay for same, or to give security therefor. Therefore I here pray that this Honorable Court

make his order to the Court Reporter to prepare said statement of Facts at the expense of the State of Texas.

(Signed) Bob (His X Mark) White, Defendant.

Witness to Mark: —— ——.

Subscribed and sworn to this the 26th day of August A. D. 1938. Lester K. McGuire, District Clerk in and for Montgomery County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 42] In District Court of Montgomery County

[Title omitted]

Order Sustaining Pauper's Affidavit and Ordering Reporter to Make Statement of Facts

On this the 26th day of August, 1938, after the court had overruled the defendant's motion for a new trial, there was presented to the court an affidavit signed by the defendant in the manner provided by law saying that he is too poor to pay for a statement of facts in this cause; and it appearing to the court that such affidavit and application is in due form of law; and it further appearing to the court from the statement of the Acting Official Reporter of this court, W. H. Graham, that he did not care to contest the same and would not do so; and it appearing to the court that the defendant was tried in this court on a charge of rape; that he was convicted by a jury and his punishment was assessed at death, it is the opinion of the court that said defendant is entitled to a statement of facts without payment therefor at this time:

It is therefore ordered by the court that the Acting Reporter in this court, Mr. W. H. Graham, who reported the testimony in this cause, be and he is here now ordered to prepare, as soon as possible, a complete statement of facts in this cause, in duplicate, and to deliver the same to counsel for defendant as soon as it can be made up, and that said Reporter look to The State of Texas for his pay, all as provided by law in such cases made and provided.

W. B. Browder, Judge Presiding.

[File endorsement omitted.]

[fol. 43] IN DISTRICT COURT OF MONTGOMERY COUNTY

[Title omitted]

BILL OF EXCEPTION No. 1—Filed September 28, 1938

Be it Remembered that during the trial of the above styled and numbered cause, the following proceedings were made:

The Court overruled the defendant's motion to quash the special venire in this case, said motion to quash this special venire being made for the reason that there were no negroes among the special veniremen constituting the special venire from which the trial jury had to be selected to try the defendant, and that negroes purposely were left off said list of such veniremen.

And further, in this connection, after the Court overruled this motion, the State was permitted to file an answer to same, over the objection of counsel for defendant.

To which ruling of the Court, in refusing to quash the special venire, counsel for defendant then and there excepted, and now tenders this Bill of Exception and asks that the same be approved, signed, and ordered filed as a part of the record in this cause.

Examined, Approved, and Signed by me and Ordered Filed as a part of the record in this cause this the — day of September A. D., 1938.

—— ——, Judge Ninth Judicial District.

The foregoing Bill of Exception No. 1 is qualified as follows in order to reflect the true facts:

Defendant filed a Motion to Quash the Special Venire in this case on the grounds that there were no negroes constituting a part of same, and that negroes were purposely left off of said venire. The State filed its answer to said Motion, and after which, the Court inquired whether or not Defendant had any proof to offer in support of their Motion, to which inquiry they gave no answer and offered no proof in support of the allegations set out in said Motion; and after which the Court overruled said Motion.

[fol. 44] The foregoing Bill of Exception No. 1 is hereby found to be correct, as qualified, and is hereby approved

and signed by me, and ordered filed as a part of the record in this cause this the 28th, day of September, A. D., 1938.

W. B. Browder, Judge of the Ninth Judicial District.

O. K.
W. C. McClain, J. P. Rogers, W. Jay Johnson, S. F. Hill.

[File endorsement omitted.]

[fol. 45] In District Court of Montgomery County

[Title omitted]

Bill of Exception No. 2—Filed September 28, 1938

Be it Remembered that during the trial of the above styled and numbered cause, the following proceedings were had:

The Court overruled the defendant's motion to quash the indictment in this case, said motion to quash the indictment being made for the reason that there were no negroes among the jury commissioners constituting the Jury Commission which selected the Grand Jury which indicted the defendant, and for the reason that there were no negroes on the Grand Jury which indicted the defendant and that there were no negroes drawn on same, and for the reason that negroes purposely were left off the Jury Commission and the Grand Jury. And further, in this connection, after the Court overruled this motion, the State was permitted to file an answer to same, over the objection of counsel for defendant.

To which ruling of the Court, in refusing to quash the indictment, counsel for defendant then and there excepted, and now tenders this Bill of Exception and asks that the same be approved, signed, and ordered filed as a part of the record in this cause.

Examined, Approved, and Signed by me and Ordered Filed as a part of the record in this cause this the — day of September, A. D. 1938.

—— ——, Judge, Ninth Judicial District.

The foregoing Bill of Exception No. 2 is qualified as follows in order to reflect the true facts:

The Defendant filed his Motion to Quash the Indictment for the reason that there were no negroes among the Jury

Commission who selected the Grand Jury which indicted the Defendant, and for the reason that there were no negroes on the grand jury which indicted the defendant, and that there were no negroes drawn on same, and for the reason that negroes were purposely left off of the Jury Commission and Grand Jury.

[fol. 46] That after said Motion was filed the State filed its answer thereto, setting up that his motion was not timely in that it had not been presented before a change of venue was had from Polk County to Montgomery County, Texas. Notwithstanding that said Motion to Quash the Indictment had not been presented before a change of venue was had from Polk County to Montgomery County, after said Motion had been filed and the State had duly filed its answer, the Court asked the Defendant if he had any proof to offer in support of his Motion, to which inquiry no answer was given, and neither was there any proof offered in support of said Motion; after which the Court in all things overruled said Motion to Quash the Indictment.

The foregoing Bill of Exception No. 2 is hereby found to be correct, as qualified, and is hereby approved and signed by me, and ordered filed as a part of the record in this cause this the 28th, day of September, A. D. 1938.

W. B. Browder, Judge of the Ninth Judicial District.

O. K.
W. C. McClain, J. P. Rogers, W. Jay Johnson, S. F. Hill.

[File endorsement omitted.]

[fol. 47] In District Court of Montgomery County

[Title omitted]

Bill of Exception No. 3—Filed September 28, 1938

Be it Remembered that on the trial of the above styled and numbered cause, the State offered in evidence, the purported statement of the defendant Bob White, and which was objected to at the time by counsel for defendant for the following reasons:

1. It was not a voluntary confession and was made under duress, and the defendant could not read or write and did

not understand what he was signing, if he did sign said statement.

2. The same was secured while the defendant was under arrest, was not given the statutory warning, and was under coercion as severeal officers were present at the time, some of whom had just prior to this taken defendant out of jail and into the woods, chained him to a tree, gave him a severe beating and threatened to kill him unless he made a confession, and that the defendant was suffering at the time from said injuries recently inflicted.

3. Said confession was dictated by Mr. Foreman, a special prosecutor in this case, and was written by Ernest Coker, County Attorney of Polk County, both men who are and were highly prejudiced against defendant, and seeking his conviction.

4. This defendant is an ignorant negro, can neither read nor write, and said instrument shows very clearly that he did not, and could not, possibly have dictated the same.

5. Promises were made at the time to induce defendant to make a confession; that the same was not voluntary and was not made by defendant but by Mr. Foreman, who dictated same.

6. Said confession shows on its face that it was not a voluntary statement of the defendant, and was made in answer to questions propounded to him by attorneys and officers, is not a part of the res-gestae, and should not have been admitted in this case.

[fol. 48] 7. Defendant was not permitted to talk to an attorney to advise him but was kept incommunicado, was not permitted to use a telephone was kept in the woods by rangers a great portion of the time and was denied every right that even this Defendant is entitled to under the Constitution of Texas and the Constitution of the United States.

8. The officers taking said statement had already gone to the Cochran home, to the home of Defendant and were familiar with the road and surroundings between said places, and the things therein set forth as coming from the mind of the defendant were in fact from the minds of those present who prepared and those who assisted in preparing said statement.

9. At the time of the arrest of the defendant he was arrested without warrant or cause other than a mere supposition, and said arrest was illegal, and anything contained in said purported confession concerning the same thus could not be made legal evidence, and thus was improperly admitted as evidence.

10. The information therein set forth was obtained by an illegal invasion of the home of the defendant into which entry was made without legal search warrant and from which property of the defendant then and there was taken without legal process for such purpose the same being taken during the time of such illegal invasion and entry, and any statement in said purported confession concerning such property so obtained cannot thus be made legal evidence and thus was improperly admitted as evidence.

11. There is no legal corroboration of said purported confession upon any material matter.

12. There is no identification of the defendant as the person who committed the offense other than that contained in said purported statement, which statement was obtained after at least one week of mental and physical coercion and fraudulent persuasion in a strange community under the influence of the presence of officers who testified that they had taken the defendant from jail during the period in between the time of his arrest and the time of making his confession, and at such times had taken him down the road [fol. 49] and off the road and into the woods so many times the number thereof could not be remembered, and in this connection the prosecutrix did not in the slightest manner identify the defendant.

13. The same is not a free and voluntary confession on the part of the defendant and was not signed by the defendant, and said statement was secured while the defendant was restrained of his liberty and under arrest, and that he was not given the statutory warning, was not free from coercion and persuasion, that he could not read or write and was not mentally able to understand the contents of said instrument, and was suffering at the time from assaults just previously received, and had been in process of infliction for at least one week prior thereto.

Defendant's objections were by the Court overruled, and the statement was permitted to be read to the jury, to which

ruling of the Court counsel for defendant then and there excepted and now tenders this Bill of Exception and asks that the same be allowed, signed, and ordered filed as a part of the record in this cause.

Examined, Approved, and Signed by me and Ordered Filed as a part of the record in this cause this the 28th day of September, A. D. 1938.

W. B. Browder, Judge, Ninth Judicial District.

O. K. W. C. McClain. J. P. Rogers. W. Jay Johnson. S. F. Hill.

[File endorsement omitted.]

[fol. 50] Clerk's Office, Court of Criminal Appeals, at Austin, Texas

Clerk's Certificate

I, Olin W. Finger, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that the foregoing forty-nine (49) pages contain a true and correct copy of the transcript in cause No. 20188, Bob White vs. State of Texas, now on file in my office.

Witness my hand and seal of said Court, this March 11, 1940.

Olin W. Finger, Clerk of Court of Criminal Appeals of Texas. (Seal Court of Criminal Appeals of Texas.)

[fol. 1] In District Court of Montgomery County for the Ninth Judicial District of Texas

The State of Texas

vs.

Bob White (Colored)

Statement of Facts

Hon. W. B. Browder, Judge Presiding

Appearances

Attorneys appearing and participating for the state: Hon. W. C. McClain, of Conroe, Texas, District Attorney.

Hon. Roy L. Pitts, of Conroe, Texas. Hon. J. L. Manry, of Livingston, Texas. Hon. Fox Campbell, of Livingston, Texas. Hon. Z. L. (Zimmie) Foreman, of Livingston, Texas. Hon. Ernest Coker, County Attorney of Polk County (in and out).

Attorneys appearing for the defendant: Hon. J. P. Rogers, of Houston, Texas. Hon. W. Jay Johnson, of Houston, Texas.

Be it Remembered that upon the trial of the above styled and numbered cause, the following evidence, and none other, [fol. 2] was admitted by the court before the jury, all testimony offered but not admitted, not being in this record.

(Morning Session, August 3, 1938)

H. R. Appling, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. McClain:

My name is H. R. Appling. My name is spelled "A-p-p-l-i-n-g". I live at Beaumont. I was living in Beaumont, in August, 1937. I have lived in Beaumont a little over fifteen years. I am in the drug business. I have never served as a Peace Officer.

I am now acquainted with Bob White, the defendant in this case, but I was not at that particular time. I recall seeing Bob White on or about the 18th day of August, 1937. I saw him at the court house, in Beaumont. I recall the occasion of seeing the defendant. At the time I saw the defendant, I witnessed his signature. I witnessed his signature to the instrument which you now show me. I would recognize that instrument if I were to see it. The instrument which you have handed me, dated August 18th, 1937, signed "Bob White" with his mark, and witnessed by H. R. Appling and Herman Crocker, is the instrument that [fol. 3] Bob White signed. That is the same instrument that I witnessed. I know Mr. Ernest Coker, County Attorney of Polk County, Texas. I saw him on that occasion. Before Bob White signed this statement or instrument, I recall of a warning that was given to him. This instrument was signed by Bob White's mark. I find that this instrument is

on five pages. His signature, by his mark, appears on each page. My name appears on each page as a witness. The name "Herman Crocker" also appears on that instrument as a witness. I have known Mr. Crocker about ten years. He is not a Peace Officer. He is in attendance on this court. Those present at the time Bob White signed the statement were: Mr. Foreman, Mr. Coker, myself and Mr. Crocker. All four of us were present. Mr. Foreman and Mr. Coker, the County Attorney, were present. Bob White signed the statement in the court house at Beaumont. Before Bob White signed the statement with his mark, it was read to him. I read it to him. I read the entire statement to him. I saw Bob White make his mark on each page of this statement.

I was not acquainted with Mr. Foreman at that time. Nor was I acquainted with Mr. Coker, the County Attorney, of Polk County, at that time. I had never seen either of them before. That was the first time I ever saw them. I did not know the Cochran family. I did not know Sheriff Holliday or any of the Peace Officers. I had never seen the defendant before.

Witness excused.

[fol. 4] Ernest Coker, a witness called on behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. McClain:

My name is Ernest Coker. I live at Livingston, in Polk County. I am County Attorney of Polk County. I was acting as County Attorney of Polk County, Texas, on or about the 18th day of August, 1937.

You have handed me an instrument consisting of five pages, dated the 18th day of August, 1937. I have seen that instrument before. That is a statement made by Bob White, the defendant in this case. I typed that statement at Beaumont, Texas. This statement was made by Bob White and written as he made the statement: written as he told it. As Bob White made the statement, I wrote it down with a typewriter. It is written down as Bob White told it, exactly as he related it to me and this is the copy of that

statement after it was written down and Mr. Appling and Mr. Crocker were called in, and he signed the statement with his mark. That—before he made this statement I gave him a warning. I warned him that he did not have to make any statement at all and that any statement that he might make could be used in evidence against him upon the trial concerning which the statement was made. I gave him the warning that is written at the top of the statement. In fact, he was warned twice. After I had given him that warning, [fol. 5] he then made the statement that I have here. After he made the statement, Bob White signed it with his mark. That is my signature. I wrote the name "Bob White" and he touched the pen each time that we got to a sheet. He was not asked to do so. He would reach over and touch the pen of his own accord. I called in two witnesses. I believe that is in this statement; that he was called in after the statement was written. I was right in there. He was called in before the statement—Mr. Appling a man I had never seen before and another man named Crocker. I did not know either of the gentlemen until they were called in. They witnessed the signature. Mr. Appling read the statement to him, before the defendant signed it.

Mr. McClain: At this time we offer in evidence this statement as State's Exhibit #1. * * * We offer at this time, in evidence, this paper. We offer the entire five pages save and except the first line and a half on page No. 5. Of course they may offer it if they care to read it to the jury.

The Witness: This is the statement as made by the defendant, Bob White.

Witness excused.

(At this juncture, there was read to the jury the following instrument:)

STATE'S EXHIBIT No. 1

"Date. 19th day of August, A. D. 1937, Page 1.

STATE OF TEXAS,
County of Jefferson:

To Whom it May Concern:

[fol. 6] "After I have been duly warned by Ernest Coker, County Attorney of Polk County, the officer to whom this

statement is made, that I do not have to make any statement at all and that any statement I make may be used in evidence against me on the trial for the offense concerning which this statement is herein made, I wish to make the following voluntary statement to the aforesaid person:

"My name is Bob White. I live in Polk County, Texas. I am 27 years old and live on Carey Cochran's farm near Scarborough. I make the following statement, to-wit:

"I have known Mr. Ernest Cochran, Mr. Carey Cochran and Mr. Dude Cochran all my days. I have lived on Mr. Carey Cochran's farm most of my life. I know each of these men when I see them.

"On the 19th day of June, I was in Houston, Harris County, Texas. I had been working there with one of my uncles, Ed Goree, and staying at his house some. Some several days after the 19th of June, my brother, Edgar Wright came to Houston with Buddie Harrell, Sammie Branch. They came in my brother's Model a Ford car. I went back home with them, leaving Houston after dark. When we got even with Mr. Jett Brock's home there in Livingston I got out of the car and went over to one of his servant's house and spent the night with Hester Profit. I stayed around Livingston several days and spent a part of each night while there in the same servant house with the same girl. From there I went down to my mother's home on the Cochran farm. I assisted my mother with the crops, [fol. 7] helping them plow and hoe. The next work I did, I worked for Mr. R. Q. Dillon on the Garvey farm. I worked there some three or four days. Mr. Dillon gave us a little beer party, this because, *this because* we hurried up and worked his crop. Then I went back to my mother's place and assisted her and the other members of her family with her crop. On Tuesday afternoon, August 10th, I saw Mr. Ernest Cochran in his Ford V 8 with Mr. Dude Cochran wife come by the field where I was working with other members of my family and go on down toward Mr. Dude Cochrans home was Mr. Ernest Cochran came back by the field a short time after this. I worked on in the field until quitting time and went to my home. We all eate supper at my home, besides my family, Aubrey Riley was there. Before we left the field, Aubrey Riley gathered several ears of corn,

Bob (his X mark) White.

Witnesses H. R. Appling, Herman Crocker.

After we reached home, Aubrey Riley and some of the women folks parched the corn. It was parched in a skillet. We ate supper there. Among the things, we had okra, flour gravy, flourbread. After we ate we went out on our porch and I went in my mother's room and changed clothes. I put on a pair of brown pants, and a brown shirt, rolling the sleeves of my shirt above my elbows. I had on a pair of shorts but did not have on any undershirt of any kind? I came back on the porch and sit there on a wooden bench for [fol. 8] a short time and played with my little fist dog. I call him Jack. I then left home. This was after dark. I went bare headed and followed the main road down by all the houses between there and where I turned off to go to Mr. Dude Cochrans place. I had on the same shoes I now have on. They are white shoes and rather sharp toed and are about size 10. The first house I passed was where William McGowen lives. So far as I know, no one was up or awake at this house. The next house I passed was the home of Dillard King. So far as I know, no one was awake there. The next house I passed was the home of Peter McGowens. So far as I know, no one was awake there. The next house I passed was the home of June McGrew. No one was awake there that I know of. The next place I passed was Walter McDade whose home was just across the road from June McGrews. The next place I passed was Lenords Terry. So far as I know, no one was awake there. The next place I passed was Milton Thomas. While passing this place I heard Milton's little girl hollering at a dog that had been fighting her puppy. She said to this dog, get off my puppy. I am going to kill you. I heard Milton laughing at her. I then passed the home of Fred Johnson. I did not hear any there. Then I passed Mr. R. Q. Dillon's place. I did not hear anybody there. I then passed the home of Dave Ryan. I did not hear anybody there. Then I passed the home of Jack Harrison. I did not hear anybody there. Then I passed the home of Mr. Ed Dillon. This is the last house before I turned off the main road up to the home of Mr. Dude [fol. 9] Cochrans. I walked up to Mr. Cochran's home and did not see his car or any car out around the house. I walked by the house, leaving the house to my left and walked on down to the little store which is behind the Cochran home proper. Babe Mason, a negro, lives in a place above the store. There is a gate there at the back of the store in which gate I entered. In going by the store, I could look into Mr.

Cochran's car shed and saw that his car was not there. I then went around behind the store and open another gate that leads into the yard. When I entered the first gate by the store I pulled off my shoes and left them inside by the gate. I left this gate open, also the other gate into the yard. Then I went to the back door, the one I took to be the door into the kitchen, This door was not fasten. It was a screen door; and I opened it and eased inside. From what I saw in this room I took it to be the kitchen. I then went into another room and passed along by what I took to be the eating table. Then I went into what I thought was the living room. In this room there was some windows in front of me. I saw a little table there with what I thought was a lamp on it. I had never been in this house before.

Bob (his X mark) White.

Witnesses: H. R. Appling, Herman Crocker.

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"In the living room, what I thought was the lamp was round and looked like a bucket. There was a rug on the floor in the living room. From there, I went upstairs. The stairs, as far as I could tell did not have any rug or carpet on them. In going up the stairs I put my hands on the walls and I am sure the walls was papered. While going up the stairs I took my knife out of my pocket, which was a Texas Jack, it being a knife that the officers took off me when I was arrested and which knife Mr. Holliday has now. When I got up into the room the bed was kindly to my right with windows, or at least a window toward the main road down toward the Scarborough house, this being the road I followed until I turned off to Mr. Dude Cochrans place. There was another window to my left, this being the window that the woman tried to jump through. When I first got into the room I "zerned" a woman lying in the bed. I walked up to the right side of the bed. The woman jumped out of the bed on the other side from where I was and run to the window from the foot of the bed of the window to my left as I entered the room. She struck the window with some part of her body, and just at that time I grabbed her with both of my hands under her arms from the back and pushed her back. At this time I had the Texas Jack knife open in my hand. She grabbed me by the arm and I jerked the knife through her hand. The first thing I remember being said

by either one of us, she spoke and asked "who is you". I did not at that time say anything. I am a little too fast. [fol. 11] The first thing that was actually said, the woman screamed when she hit the window. Then after she had asked me who is it and said "don't you know them Cochrans will kill you" I said "I don't care." Then I threw her down there on the floor. When she wheeled and jumped off the bed I heard a object hit the floor that sounded to me like iron of some kind. As I said, when I threw her down I then closed my knife up and put it in my pocket. When I had her down on the floor her feet was closer to the door that I had entered, than her head. She had on what I would call a gown. After having her down on the floor and putting my knife in my pocket, I then unbottoned my pants and actually had the woman: what I mean by having her is that I had intercourse with her. I actually placed my male organ in her female organ and there had intercourse with her until I discharged myself or, as I call it, cum. During the entire time that I was actually having intercourse with her she lay there on the floor with her arms stretched by her side as if she had fainted or was dead. When I got through with her I left her gown up and started to leave. I got near the door and decided for sure she was dead. I then went back to her and put my hand around on her body; this to see if she was breathing. Then I left there and went out the same way I had come in. I went out the same way I came in; that is, through the back gate by the store where I picked my shoes up. I run from there down the road by the side of the house to about the male box where I sat down and put my shoes on and tied them. I then went back the same route [fol. 12] I came down. I then went back to my home and went to bed on a wire cot that is there now. I would judge I was gone away from home about a hour. I had gotten home and gone to bed and I recognized Mr. Carey Cochran's car and one of the sheriffs cars pass there.

Bob (his X mark) White.

Witness: H. R. Appling, Herman Crocker.

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"I told my mother right there and then that "there goes Mr. Caries and Mr. Hollidays cars and when Mr. Carey comes back I am going to stop him and tell him about the cotton. My mother said "well see him then" because I do

not want to pay Williams boy $1.20 a bale for hauling my cotton. Immediately after this I went right on to sleep and did not wake up any more until daylight. The next morning I woke and went on the field to work and this is where the officers arrested me the following morning, about 9 or 10 o'clock.

"Before this time when I went down there and raped this woman I had been to the little store in the back of the yard since Mr. Dude and this lady had married, one time. I went over there to buy some lard for my mama. I walked up there near the house and called Mr. Dude. This same lady, Mrs. Cochran, came to the back door and answered me and asked me what I wanted. I told her I wanted some lard and she sent her oldest little boy, Joe, out there to wait on me. He came out with a key and unlocked the store and we went in. When we got in the store, there was a piece of paper on the counter with some writing on it. I picked the paper [fol. 13] up and tore it some. The little boy, Joe, said to me, "don't do that, don't tear the paper" saying it might be some business or something. He took the paper and put it back somewhere. As I said, this is first time I have been to their home. I knew both of the little boys one — them was named Joe and the other Laddie. I knew Mrs. Cochran. I had seen her a number of times, riding around there and a number of times with Mr. Dude. As far as I know this all the talk that went on between us in the room. The place I raped this lady was in Polk County, Texas, and at Mr. Dude Cochran's home some ten or twelve miles west of Livingston in the Trinity river bottom.

"I left my trousers, the brown trousers, and the brown short that I wore that night in my mama's room at her home.

"When I left the house running down the road I was running on my toes more than any other part of my feet.

"I have been ask to tell all I know about this affair and in talking to Mr. Ernest Coker, the man to whom I am making this statement, he has never said a harsh word to me. What I am saying in this statement is exactly as I remember it. What I have said in here is the entire truth as I remember now.

Bob (his X mark) White.

Witnesses: H. R. Appling, Herman Crocker.

[fol. 14] Page 5

"* * * I was barefooted, without socks and the woman was barefooted and had on nothing but a gown. The last time I had shaved was the Sunday before at the home of Walter McDade. Aubrey Riley was with me at that time, and remarked I ought to shave too because I need one. I shaved with a silver looking safety razor.

"I have had this statement of some five pages read over to me and fully explained by a man who I am told is Mr. H. R. Appling, who says he is in the drug business here in Beaumont, Texas. The statement is entirely true and correct as I remember it."

Bob (his X mark) White.

Witnesses: H. R. Appling, 895 Calder; Herman Crocker, Beaumont Motor Co."

William McGowen, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. McClain:

My name is William *McClain*. I live up in Polk County. I know Bob White's mother. She lives in the same com-[fol. 15] munity where I live. I live about ten miles west of Livingston. In going from my home to Livingston, I would pass Bob White's mother's home. My house and her house are on the same road. I live to the west of Bob White's mother's home. His mother's name is Martha Coachman. I don't know how far I live from his mother's home but it is about 150 yards; something like that. The road I live on runs east and west. My house and her house are on the same side of the road. It is on the south side of the road.

I am acquainted with the defendant, Bob White. I don't know how long I have known him. I have knowed Bob White practically all of his days. I remember the time when Mrs. Cochran is alleged to have been ravished. I recall what I did on that day. I was at work that day for Mr. Cary Cochran cutting some ditches across the field;

not making the ditches but cutting the bushes off of the ditch. That field sits off right in front of my house, kind of north. I don't know how close my house is to the road; something like six or seven steps. My front yard fence is just right at the road. I do not know exactly about the time I quit work that day. I quit work before dark. The sun was not down, when I quit work. After I quit work I came out to the house. I did up the chores, what I might say was my night work; fed the mules and got in water and wood.

Before I went to bed that night, Bob White passed my house, before I even eat supper that night. I saw him traveling. He was walking, going in a westerly direction [fol. 16] up the road. I know where Mrs. Ruby Cochran lives. He was going in the direction of her home, he was by himself. I did not see him any more that night. If he had kept traveling the same road, at the time I saw him pass my house, that road would have carried him on down to Mrs. Cochran's.

Cross examintion.

By Mr. Rogers:

At that time I lived on the Cochran farm. I am still living on that farm. I don't know how long I have lived on the Cochran property. Practically since I have been in the County, I have been on it farming.

Q. You are kind of confidential man up on the Cochran farm; you do the house work, lots of times.

A. Oh, not so frequently. Of course, if they would ask me to do something, I would. On that date, I don't know sir, what time we knocked off from work. It was not sun down. It is something like two or three hundred yards out across the field from where I quit my work until I got to my home. Only one road passed my house. There are four rooms in the house that I live in. The kitchen to my house is in the back. As to how many rooms between my front gallery and the kitchen, you pass right through one room, into the kitchen. I left my work about sun down and went home. When I arrived there, there was no one at my home but just my wife. No other person was there. I got home about dark. It was a little before dark. Seomtime before dark. I then proceeded to feed my mules. And I then came into my home. After attending to my household

duties around the place, I came in for my supper. I stayed [fol. 17] on the front gallery and then I went to my supper. I don't know, sir, how long it took me to feed the mules and bring in the wood. It didn't take long; something like ten or fifteen minutes. I quit work before sundown, on that evening and then when I got through with my work and went and set down on the gallery, it was not dark. That is when I saw Bob White. I then went on back to the kitchen to my supper. I don't know how long I was in the Kitchen—in the back room, eating my supper. Something like fifteen or twenty minutes, I reckon. I don't know—any longer than I was eating supper—I don't know. I had a water-melon patch at that time. That water melon patch was something like 200 yards off of the highway going in the direction of the Cochran home, from my home, or better, across the field. Coming from the direction of Bob White's mother's home going in the direction of the water melon patch, he would pass my house. After leaving the front porch and going back into the kitchen I never did see Bob White pass going back to his home. I never did see him no more. If he had passed while I was in the kitchen eating supper I would not have seen him.

Of course, eating in the back of my house and my view being obstructed from the road, I would not swear before this court and jury that this man did not pass, going back to his home. I don't know what the distance is—what distance the water melon patch is from my home going in the direction of the Cochran home from my home. It is some-[fol. 18] thing like three or four hundred yards. I never did see him any more. As to whether I ever did see Bob White pass going in the direction of his home as late as ten or eleven o'clock, I never did see him any more. The only time I saw him was when he passed there about dark when I was at home. On the date of the alleged assault, the only time I saw Bob White pass my home, I was on the gallery and it was not then good dark. If this alleged rape was perpetrated about ten or eleven at night, I didn't know anything about it.

Cross examination.

By Mr. Johnson:

From the time Bob White passed my house going in the direction of the water melon patch—assuming that he went to the water melon patch and back home, and had a couple

of water melons, and at the gait he was traveling and the usual and customary travel in such matters, on that night—as to how long, in my judgment it would require for Bob White to have reached my melon patch and come on back and pass my house going to his home, I suppose it would have taken fifteen or twenty minutes. And during this fifteen or twenty minutes after I saw him go by I was in my kitchen. I went in my kitchen and I don't know just how soon he passed.

Redirect examination.

By Mr. McClain:

It would have taken him about fifteen or twenty minutes from the time he left his house from the time he returned from the water melon patch. As to how long it would have taken him to go from his house to my water melon patch and then back, well it would have taken him, if he had went [fol. 19] right to the patch and come back it would have took him—he just lived a little above my house—I don't know—he ought to have made the distance from his home to the patch and back to his house in something like fifteen or twenty minutes. It would not take an hour or an hour and a half. I know where Milton Thomas lived. Milton Thomas lived west of where I lived. That is down toward Mrs. Cochran's home. I don't know how far Milton Thomas lived from me, but something like 300, 350, or 400 yards; quite a bit. My water melon patch was between my house and Milton Thomas' house; nearly about half the distance; not around the road but across the field to where it is. In going from the White home to my water melon patch, it would not have been necessary to pass Milton Thomas' home. In going to my water melon patch from White's home, or from my home, as to whether or not it would have been necessary to pass Milton Thomas' house, it would have had no cause.

On that night, I said I didn't see him come back. To go to my water melon patch from my home, you would go up the road west about a couple of hundred wards and go into a big gate down the road, about 150 yards across the field, until you stroke the water melon patch. When you get to this gate into this field, my water melon patch is just about half the distance from my house to where Milton's house is; the field and the gate is just about half the dis-

tance; something like two or three hundred yards from there to Milton's house. It would be something like 250 yards on down to Milton's house from my water melon patch; something like that.

[fol. 20] Re-cross examination.

By Mr. Rogers:

In order to go from Bob White's house to the water melon patch and back, it would not take much longer than fifteen or twenty minutes because White's house was a short ways from my house, but I am just guessing at the time. Bob White lived about 100 steps from where I lived.

I knew Bob White and his family well. My house is within five or six steps of the public road. My front yard fence is right at the road. Just go out of the yard right on to the highway—right on the public road.

Re-direct examination.

By Mr. McClain:

In going west from my house toward Mrs. Cochran's home, the first house you pass is Bodely Holliman, who lives in the first house. Bodely Holliman and his mother were living in the nearest house to me at that time. Last year, Bob Davidson was living in the next house toward Mrs. Cochran's home. He is living there now. My brother, Peter, lived in the next house. His name is Peter McGowen. John McGrew lived in the next house. In the next house west I think a fellow named Leonard Terry and a fellow they called "Pez" lived in the next house. Milton Thomas and Leonard lived in the last house until you crossed over, and you strike the farm where Mr. R. Q. Dillon and the next house after, Mr. Dillon, a man named Fred Johnson lived there on that side of the road. Mr. R. Q. lives in the next house and then right above that on the hill is the Listen place, Mr. Kirkpatrick lived there last year. Jack Harrison lived in the next house. No one lived in [fol. 21] the next house, which was a little house. This Mr. Dew lived in the next place, to the right of the road.

Witness excused.

MILTON THOMAS, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Coker:

My name is Milton Thomas. I live at Cleveland. In 1937 I lived on Mr. Carey Cochran's farm in Polk County, which was out west of Livingston, I guess. I lived near the Scarborough place. I knew Bob White before that. I know where his mother lived in 1937. In 1937 I lived about a mile from her I guess from Bob White's home I live in the direction of the Scarborough place. In going from my home in the direction of the Scarborough place, I would pass by Mr. Dude Cochran's. In going from my home toward the home of Bob White's mother, I would go toward Livingston. I live between Bob White's home and Mr. Dude Cochran's home.

I remember the day that Mrs. Ruby Cochran is alleged to have been assaulted that night. On August 9th, 1937, I was picking cotton. Started to picking cotton that day. I picked cotton on August 10th. I got home the night of the 9th just about sun down as near as I can get at the time. On the night of the 10th, I went to cousin Peter [fol. 22] McGowen's after I came out of the field and watered my horses and ate my supper. I don't know what time it was when I went to Peter McGowan's but I reckon it was a little after dark; something like that. It was considerably after dark. It was a little after dark. I didn't stay there more than thirty minutes, I would figure. I just went there to see a sick boy. I didn't tarry very long. I don't figure I stayed there over thirty minutes. When I came home, I went on in the house. Jack Harrison was with me and then I know—I run a little joint there and I sold Jack some tobacco and a box of snuff and he came right back out on the porch with it. I wanted to cool off, and so I set down a while. Nothing happened that night while I was out there more than my little girl had some little puppies she was feeding and a big dog bit one of the puppies and she made the remark that she would kill him because he bit her puppy. I told her not to; the dog didn't hurt the puppy. I just laughed and that is all I knowed of it. That was at the front porch. It was only a short

distance from my front porch out to the road that led by my house. I don't know for certain but it was not over thirty or thirty-five steps. I would figure it was somewhere about eight or nine o'clock, I guess. I did not make any statement or say anything at the time the big dog bit her little puppy but just told her that the big dog didn't hurt her puppy. I told her not to kill the big dog as he did not hurt her puppy. I just laughed and told her that.

At that time, I knew where William McGowan's water melon patch was. It was between my home and Bob White's [fol. 23] home. Will McGowan's home, the way I figure it, was just about half way from his house to mine; would have been about the distance that his water melon patch was from my house—from his house. William McGowan lived between my home and Bob White's home. In traveling from William McGowan's home to his water melon patch it would not be necessary to come by my house because he could come right to the gate and go in the field. He would not have to come by my house at all. The water melon patch was between my home and William McGowen's home.

The first time I ever saw you to know who you was was the time they brought me out before the grand jury. That is the time I went to your office and made a statement. That is the first time I ever saw you to know you. That is the first time I ever talked to you about this dog fight. The first time I said anything to anybody about this dog fight was when Mr. Holiday came and asked me, and I told him that same day. That was the same day I went to your office in the court house.

Cross-examination.

By Mr. Rogers:

I had lived in the house I was in out close to the Bob White home, seven or eight years on the same place but that was the first year that I had stayed in that house. But I had lived on that same place seven or eight years. I stated that I lived between the Cochran home and William McGowen's water melon patch. I said that to go into his water melon patch, they did not have to pass my place. [fol. 24] I went to bed that night something like nine o'clock, I suppose. It was not very late at night. I was there when

the dog fight took place at my house. That was at my house, after I had gotten home. I got home out of the field somewhere around sun down and dark but I had been up to Peters' and back home. It was dark when the dog fight took place. Those present when the dog fight took place besides myself, were just my wife and little girls. As to how after dark it was when that fight took place between the old dog and the puppy, just to make a guess at it, it was after I had come home from cousin Peter's. I would not be certain it was later than 8:30; I had been to cousin Peter's and back. I never did see Bob White pass my house that night. I saw the dog fight. If he had passed my house, I could have seen him, but I did not see him. If Bob White left his home and went to the water melon patch and turned and went back to his home, I would not have seen him. The time I saw the dog fight, was a good bit after dark. It was a good bit after dark, because I had walked up to cousin Peter's and come back home. It was something like a mile from my house to Bob White's house. I don't know how far it was from my house to the water melon patch. Something like a half mile, I reckon. I guess it would have been, then, about a half mile from Bob White's house to the water melon patch. I could not swear positively. I was just guessing at it.

When the officers came to my house investigating this alleged assault, it was about a week after, when they was talking to me about it. They did not come to my house [fol. 25] and say anything about it to me on the night it is said to have happened. If any officer came to my house that night, he didn't say anything to me. No officer talked to me that night. They did not talk to any one else in my house. I have not talked to anyone about this case only just when I been in court. I have not said anything to Mr. Foreman, but I have talked to Mr. Coker. I guess he took a statement from me. I signed a statement the day that he carried me out there. He didn't carry anybody else out there with me to take a statement from except just me and my folks, the day they carried me out there.

I don't know what distance my home is from Mrs. Cochran's home. I reckon it is a mile or a little bit further. The road from Bob White's house to the Cochran home is graded; just a dirt road. It was not graveled at that time. The place I was that night where the dog fight took place, was at my home. Peter McGowen's house was just a short

distance from my house. I guess it was one hundred yards, I reckon. The water melon patch was between my house and William McGowan's house. You could go to the water melon patch without going to William's house. I don't know how far I traveled in going to and coming back from Peter McGowan's house, but his house is about 100 yards from my house. I went up that road to Peter McGowen's house and back the road. I stayed at Peter's house about thirty minutes, and then came back to my house, the same way I went. I did not meet Bob White in going or coming on that road. In going from Peter's house I was going [fol. 26] back towards William's house. I was not going towards Mrs. Cochran's house. As to whether the girl hollered loud at the dog, she just told me, like I could do something to him—she says you see, that dog bit my puppy. No one else was there besides me and my daughter and my family; some boys walked up. I don't know, sir, whether the girl has a sharp or shrill voice. She is pretty, apt. Didn't seem to me like she spoke loud. She just spoke it like I quoted it.

Witness excused.

ERNEST COKER, being recalled by the State, further testified as follows:

Direct examination.

By Mr. M-Clain:

In Bob White's statement, this statement is made:

"While passing this place, I heard Milton's little girl hollering at a dog that had been fighting her puppy. She said to this dog, get off my puppy, I am going to kill you. I heard Milton laughing at her." The first time I learned of that dog fight, was at the time Bob White made that statement, set out in the statement. After Bob White made the statement stating that he had heard a dog fight at the time he passed Milton's house—on the night of the alleged offense, I put forth an effort to see Milton Thomas. The statement was taken on August 18th. I then saw Milton Thomas the following day, which was August 19th.

That is when I had him come up to my office. That is the first time I had ever seen the negro Milton Thomas to know who he was; when he came up to the office and told me about [fol. 27] the dog fight. He came at my request. It was at that time that I inquired of him whether or not the dog fight occurred, at his place on this particular night. As I recall, Mr. Holliday, who was sheriff at that time went and got Milton Thomas and brought him to me.

Witness excused.

ALMA THOMAS, a witness called on behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. McClain:

My name is Alma Thomas. My father's name is William Thomas. Last year, I lived in Polk County. I know Mr. Dude Cochran. I know where Mr. Dude's wife, Mrs. Ruby Cochran, lives. Last year, I recall of something happening to Mrs. Cochran. I was at home on the night that something is supposed to have happened to her. My mother, my father and my sister were at home with me. I recall of being out in the front that night before I went to bed. I had a dog. At that time he was a little puppy. My father had a large dog. I remember something happening between those dogs on the night that something is supposed to have happened to Mrs. Cochran.

[fol. 28] Questioned by the Court:

I am twelve years old. It is wrong to tell a story. If you swear a lie, the bad man will get you. I went to school awhile.

Direct examination continued.

By Mr. McClain:

In that night, the big dog bit my little puppy and I got out of the door and told him if he bit him again I would kill him. Daddy kind of laughed and said "he won't hurt your puppy." My daddy kind of laughed and said the big

dog did not hurt my puppy. That was on the night that something was supposed to have happened to Mrs. Cochran. That was right after dark when the big dog jumped on the puppy. I remember Mr. Ernest Coker talking to me later. That is this gentleman here. I remember going with my father up to his office in Livingston. I remember talking to him about what I would testify to.

Cross-examination.

By Mr. Rogers:

I don't know how old the little puppy was that the big dog jumped on. That was the only fight the big dog and the little dog ever had. Both of them are pretty good all the time. My puppy had not been there very long. When the big dog jumped on my little puppy, that made me mad and I hollered out loud. That was just after dark. It was right after dark when that happened. I was at home asleep at ten or eleven o'clock that night.

Witness excused.

[fol. 28-a] R. D. Holliday, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. McClain:

My name is R. D. Holliday. During the year 1937, I was Sheriff of Polk County. I first became Sheriff of Polk county, 1923, I believe it was. I am an Officer at this time. I am now on the State Ranger force.

I know where the Cochran home is located in the west part of Polk County. I know Mrs. Ruby Cochran. On the night of August 10th, 1937, I received a call to go to the Cochran home about ten or twelve miles west of Livingston, on a farm. I received the call something like about eleven o'clock. I immediately went to the Cochran home with Mr. Kimball, who was deputy sheriff at that time. The Cochran home was about ten miles west of Livingston; something like that. I don't know how long it took me to drive from Livingston to the Cochran home. I drove just

as fast as I could drive; a few minutes. On reaching the Cochran home I found Mrs. Ruby Cochran there. She was in the house, upstairs, in the bed room. Upon reaching her home, Mrs. Cochran made a statement to me. I went up there and she related what had happened. She seemed to be quite upset; nervous. She told be what had happened. I then came downstairs, went out of the house and went back north of the Cochran home. That was to the back of the house. I began then, looking at some tracks. [fol. 29] I found tracks. There was a space, about half way, I guess, I will say fifteen or twenty feet from the steps there was a place where the dogs had been scratching in the dirt and there was a fresh bare foot track stepping in dirt. I went on to the gate and the gate was open and there was a bare foot track in that gate, and you would go on up a little further and then it turned right square to the right and there was another gate there. It was open and I saw a bare foot track in that and then there was some grass about twenty-five or thirty feet, I guess, I could not see any track; a kind of grass near the road running south of the house, there was some bare foot tracks there, looked like the track of a man running and leaping on his tip toes. Sometimes you could see a little heel print.

The tracks I observed were pretty large tracks. I judge the track was about a nine or ten shoe. I have seen shoes. I have had occasion to observe various size shoes. I can look at a track or a man's shoes and judge as to the approximate size. The approximate size of this track, was a nine or ten shoe, is what I would judge it to be.

The first gate I spoke of was north of the residence; and the second gate was still inside of the enclosure and you turn right to your right by a little building and then there was a gate beyond the building, the best I remember, and that was facing east. And then there was a road came along [fol. 30] and there was some grass there and then went on down by the house, going south. At the first gate I noticed, there was a garage there. The first gate was right at the garage. That gate was open. The second gate was right east of the garage. I believe maybe it was adjoining the garage, best I remember. That gate did not lead into the yard. The second gate led outside.

I noticed the doors or windows around the place. I looked

over the house and there was a screen door on the north side of the house, which was to the back of the house. The screen door was open; that is, it was not latched. It was unlatched. I had occasion to observe Mrs. Cochran's bed room. I observed the screens. In her bed room, the screen in the window in the north part of the room was partly torn out. It bulged out. It looked like something had pushed it out or pressed against it. The screen wire was pushed outward. That was an upstairs room. It showed to be partially torn. In tracking down in front of the house, I tracked the road leading from the main road going up to Mr. Cochran's house to a mail box, I will say two hundred yards. That track showed the person to be bare footed. The track leading away from the house was a bare foot track. I made an effort to locate tracks leading to the house. I found tracks leading towards the Cochran home. At the same place where I found bare foot tracks going south, I found a shoe track going north. The shoe track looked to be about a nine or ten shoe. I observed the condition of the shoe. It showed to be a sharp toed shoe. When I tracked back down in front of the house the tracks leading [fol. 31] away from the house was the same tracks. It was not a bare footed track right at the mail box. There was grass there. I found bare foot tracks close to the mail box. And then there was a shoe track, looked like the same track, that went up to the house going north—went right from the mail box on east up the road. The Cochran home, I would judge, sits 200 yards back north of the road. After I reached the road running east and west I did some tracking each way. The bare foot track played out, I kept tracking up the road. I had come over the same road in my car and sometimes it would be where a car had run over the track and we could not see the track but when it came out of the rut we could see it was the same track.

I did not see the defendant that night. I saw Bob White, next morning. I saw him up probably about Peter McGowen's. I asked Mr. Windham to talk to Bob and had him take him down to the Cochran home where Mr. Kimball, Deputy Sheriff was at that time. I talked to Bob White on the morning after the offense is alleged to have occurred. I talked to him maybe about nine or ten o'clock that morning.

At the time I talked with Bod White, I obtained a knife from him. I arrested the defendant then. I think there were fifteen or sixteen arrests made. The defendant and the other persons arrested were placed in the County jail, of Polk County. Several days later, I went to Beaumont. I think I would know that knife, if you were to show it to me. The knife which you now show me is the knife that I obtained from Bob White on the morning after the alleged [fol. 32] offense. I don't know the right name of this knife. We all call them "Texas Jacks". I have not had occasion to measure that blade and I have not measured it. That blade is four or five inches long and the handle of it is about the same.

I carried Bob White to Beaumont. Before he was carried to Beaumont and during the time he was in jail in Polk County, I had occasion to observe him there, for several days. I first had him with others but then I separated him from the others and put him by himself. While he was in jail, he would act peculiar. He would not eat. When I placed him in jail to himself I kept watching him and talking to him. I talked to Bob White before I carried him to Beaumont. I talked with him about an hour and a half. After I talked to him I carried him to Beaumont.

I have, before this, seen the statement which you now hand me. It was in Beaumont when this statement was taken; in and out when it was taken. I read it over. I was in Beaumont at the time. I read that portion of the statement wherein it is said: "The next place I passed was Milton Thomas. While passing this place I heard Milton's little girl hollering at a dog that had been fighting her puppy. She said to this dog, get off my puppy; I am going to kill you. I heard Milton laughing at her". I knew Milton Thomas. I talked to Milton Thomas after this statement was made by Bob White. That talk with Thomas was the next day. I think I talked to every one of Milton [fol. 33] Thomas' family. I remember talking to his little girl and all of his family.

I recall carrying this negro, along with some other negroes to Ernest Cochran's home in Livingston, he and fifteen or sixteen others, I recall who I saw there: I saw there, Mr. Foreman, and Ernest Cochran and I believe Mrs. Ernest Cochran and Mrs. Dude Cochran, that is Mrs. Ruby Cochran. Mrs. Ruby Cochran was there.

Cross-examination.

By Mr. Rogers:

I would not say exactly what time of night I got notice to go to the Cochran home but I imagine it was about—something like eleven o'clock at night. They have a telephone out there, that connected with the telephone system in Livingston, where I was living, and was then. It was about eleven o'clock when I went out there. I would say it is approximately ten miles from my home to the Cochran home. Mr. Kimball accompanied me out there. I was driving a Ford car. I made pretty good speed out there. I would not say exactly what time it was when I arrived there but it was some time about eleven o'clock. I do not recall about what time it became dark on that date. I imagine it was something like seven o'clock.

When I arrived at the scene where this purported assault had been committed, those I found at the Cochran home when I got there were: Mrs. Cochran; and a fellow by the name of Carlisle, I believe. This man, Carlisle, I would [fol. 34] say was a farm boss down on the Cochran farm. I have not seen him here as a witness. That is all I saw there at that time. I do not know where the two boys were. I know these two boys. I don't know how old they are. I would say about ten and twelve. I did not see them in the house at the time. I understood they were in the house.

The mail box I said something about a while ago is south of the Cochran home. I would say it was around something like two hundred yards. It is on the public highway. I don't know whether that is the only mail box in that vicinity where people go to get mail. As to whether I saw any other mail boxes in that neighborhood, I would not say, for I don't know.

I know a great many negroes in that vicinity. I know it is a common thing for negroes to go bare footed on the farm in that vicinity. A great many of them go bare footed. I know a great many of them have the same size shoe and the same size foot. I know that many negroes are the same size; and of the same type; and the same make-up and build. As to whether they had a grocery store there, Mr. and Mrs. Cochran, where groceries were furnished to practically all of the negroes in that vicinity, I don't know about that. As to whether I knew they had a little store

there, there was a little building; there could have been a store in there. That store was fifty or sixty feet from Mrs. Cochran's home.

I did not see who made those tracks for I was at Livingston.

[fol. 35] As to how long it was after I arrived there before the Sheriff at Huntsville arrived there with the blood hounds, well, I was there and of course I had to call the penitentiary at Huntsville. It was several hours from the time I arrived at the Cochran home until the blood hounds arrived there in the custody of the Sheriff of Walker County. It was something like three hours, I should judge. Those tracks that I observed were still there. The Sheriff did not let the dogs track. One reason for that was that I didn't think the dogs of the right kind; and another reason was the sheriff was not used to handling them. He got them out of the penitentiary. The dogs never were turned loose on the tracks.

We also had our expert fingerprint man come down from Lufkin. I don't know whether he took finger prints on the premises. I was down there, of course; but I am not a finger print expert. I don't know whether he even examined Mrs. Cochran's clothing to see if they could get any finger prints off of them.

There was a cast made of that track. That is not here today. I did not make the cast. There was one made but I did not make it.

When I arrived at the place, I said the back screen to the back door was unlatched. I did not say that the window was unlatched. I said "door". I didn't say anything about a "window screen", being unlatched. The screen to the door, unlatches, of course, from the inside. I did [fol. 36] not see the boys. I never did see the boys that I know of. I understood the boys were there, but I did not see them.

The nearest house to the Cochran home I would judge is three or four hundred yards. Maybe more. There is a public road running in front of the Cochran home where people pass on foot, or in vehicles or otherwise. That being a thickly settled community there and people living all along there just in a few hundred yards of each other, there is nothing unusual for people to pass along that road. I do not know whether any one attacked, as alleged in this case, could easily be heard from that house to the road or

to the adjoining houses. I don't know whether there was anything wrong with Mrs. Cochran's phone or not or her voice or her hearing.

I don't believe I could say positively how many rooms the house had in it that Mrs. Cochran was occupying on the date of the alleged assault. Maybe five rooms in it. I don't know how many times I went through the house that night and examined the rooms thoroughly, or examined the premises thoroughly. I do not remember how many times I went over the house: I went over the house. I did not see those boys there in bed. This man Carlisle that was there did not take me over the house. They told me where Mrs. Cochran was. He was out there with a shot gun, standing outside. I mean, Carlisle had a shot gun. I could not say how far he lived from the Cochran home. A half mile, I imagine, or three quarters; maybe a mile.

[fol. 37] When I made an examination of those premises there, as to whether it was the natural thing for me to do, and as to whether I did do it, was to communicate that information to County Attorney Coker and Mr. Foreman, I don't know what I told the . As to whether I told them about my visiting the Cochran home and made an investigation of the case, well, they talked to me about it. I talked with them before this purported confession was obtained but I don't recall what we talked about at to the details. A to whether I talked to them about what I found out at the Cochran home, I found out a right smart at the Cochran home. I don't know what you are alluding to. If you are talking about the information enumerated in this confession, and as to whether I read to Mr. Coker and Mr. Foreman, I don't know what information you are talking about. We talked about my being at the Cochran house that night. As to whether that talk was before that confession was made, and before I went to Beaumont, just what part are you talking about. I don't understand. I went to the premises at the Cochran home that night. I made a thorough search, according to my statement; that is true. I did not go back the next morning and talk to Mr. Foreman. I talked to them, but not the next morning. I talked to them about the case before we went to Beaumont, all right. I did not take a list of the names of the houses between Bob White's house and the Cochran house—the people that lived in every one of those houses. I did not take a list of men who lived along there on that highway. I went with

[fol. 38] the finger print man down to the Cochran house. If a man going up those steps would put his hand on that paper feeling his way as he was going up or down, as to whether a man who has been in the business for many years as a finger print man—as to whether finger prints would have been left for the finger print man, I don't know, I never seen but one or two.

As far as the gates being open, as to whether I know of my own knowledge who opened the gates, well, the one who went in the house was the one who opened the gates. I do not know who opened the gates.

I had this defendant in custody six or seven days before he was taken to Beaumont, I guess.

As to how many negroes I arrested and charged them with the same offense that I did this man, that I had them under observation, I did not file a complaint against any of them but I had fifteen or sixteen under arrest, the best I remember.

I do not recall the Texas Rangers taking this negro from that jail during the time he was confined there as my prisoner. They could have taken him from jail if they had wanted to. I don't know whether they did or not. If any of the Texas Rangers had wanted to take this defendant out of jail, or any of them out of jail and talk to them, they could have. I don't know anything about a shirt being taken from this defendant's back by the Rangers, while he was in Livingston. As to whether I know it is a fact that my son gave this negro boy a shirt to hide his naked body, [fol. 39] his shirt he wore when he was arrested was ragged and torn up and I imagine my son was sorry for him. I don't know whether my son gave him a shirt or not. My son may have given this boy a—this negro boy a shirt but he has never told me about it. Nobody has ever told me that my son gave this negro a short because the other one was really beaten off of him.

It is not a fact that I came up on the Rangers who had this negro out in the woods hand-cuffed to a tree like that, and that I made those Rangers release him. As to whether I know what caused those scars there on his arms there, on each one, I didn't know he had a scar. I have never seen any scars on his body or back.

I never heard of Mr. Cochran, the husband of the prosecutrix in this case, offering a reward for the arrest and

conviction of the man who perpetrated this wrong on his wife.

Redirect examination.

By Mr. McClain:

I did not permit any one to take that nigger from the jail and whip or abuse him or mistreat him in any way, at the time when he was in jail there. I did not notice any scars on his arm, hand or body. The nigger was never mistreated in any way there, before he made the statement or after he made it, that I know of. I believe I would have known it. The nigger never did make a statement to me about being mistreated. He has never complained to me about any bruises on his body, arms, or any where else. I have not seen any. The only accusation I have ever heard [fol. 40] made as to that, was from his counsel; that the nigger was abused or mistreated in any way. Just since—from that source.

Recross-examination.

By Mr. Rogers:

I had no occasion to have this defendant examined by a physician while he was in my custody. I did not have this defendant examined by a physician while he was in my custody. Oh, yes I did. I recall it now. I did have him examined. I did not have him examined for wounds on his back and head where the Rangers had whipped him, Dr. Flowers, at Livingston, examined him. He made a thorough examination, as far as I know. I ain't no doctor. As far as I know. He is at Livingston now. I don't remember the date Dr. Flowers examined him, but he was in jail. That was after he was under arrest. I don't know whether it was after the Rangers had him in charge. They talked to him.

Redirect examination.

By Mr McClain:

I think Dr. Flowers examined him with reference to some venereal disease I know what he examined him for.

Recross-examination.

By Mr. Rogers:

I say he was examined for some venereal disease. I don't know it to be a fact that he found this defendant did have a venereal disease and that it would be impossible for this defendant to have had intercourse with any woman.

Witness excused.

[fol. 41] Dr. Sol Bergman, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Foreman:

My name is S. H. Bergman. I am a Doctor. I am a practicing physician and surgeon. I have been practicing my profession eight years. On and before August 10th, 1937, and now, I reside at and resided at Livingston, in Polk County. I am a son of Dr. Harry Bergman, who recently died. On the night of August 10th, 1937, and before and since that time, I have been operating and managing a hospital there.

I know W. S. Cochran, whom we all call "Dude" Cochran, I have known him practically all of my life. I am thirty four years of age. I am a married man. I know his wife, Mrs. Ruby Cochran. I knew her on and before the 10th day of August of last year. On or about August 10th, 1937, I had an occasion to see Mrs. Ruby Cochran. I saw Mrs. Ruby Cochran on or about the 10th day of August, 1937, at night. I saw her in the hospital at Livingston. Mr. Ernest Cochran and Mrs. Ernest Cochran brought her to the hospital. Ernest Cochran and his wife reached the hospital with Mrs. Ruby Cochran approximately at midnight. I doctored her and treated her there at that time. At the time I saw her about midnight of that day, Mrs. Cochran was highly nervous. All of her actions were extremely nervous. [fol. 42] She was hysterical. She was crying. She was brought in to be examined and I talked to her. After having talked to her I made an examination. I examined her to see whether she had had intercourse, or not. What I wanted to do was to determine whether she actually had, or not and

so I took some secretion from the vagina and examined it under a microscope. I made an examination. I examined it under a microscope and found active sperm. Most authorities or practically all authorities agree that sperm, six hours is about as long as you can get any at all. I did find that Mrs. Cochran had had intercourse with some male person. As a Physician and Surgeon, I would not say how long this semen had been deposited there but it was active. The sperm was plenty active. I would say it had been the less than six hours. I would say that it had been within a short time prior. Under a microscopic examination, as we Doctors make them, we can tell whether the sperm is from a man or a woman. From the examination I made of this sperm, I could tell that it was from some male person.

I examined Mrs. Cochran's hands. There was a cut on one of her hands. It was a knife cut and was evidently fresh cut. I could tell by the blood still on it. Mrs. Cochran remained in the hospital that night. We put her to bed as soon as we examined her. I saw her after that, in town there. I visited her there in town at Ernest Cochran's home, for a few days after that. I am not, in any way, related to the Cochran family.

[fol. 43] As to what other treatment I gave Mrs. Cochran as to taking care of her I just used an antiseptic for venereal disease. I tried to take care of her against a venereal disease, by injecting an anti-*spetic*.

Cross-examination.

By Mr. Rogers:

I said I treated Mrs. Cochran at approximately midnight. I gave her a quarter of a grain of morphine just as soon as she came in. I said that Mr. Ernest Cochran and his wife brought the lady to my place. Of course I have no way of telling whether semen is from a white or colored person. It could have been made by her husband. I do not know that the person who had intercourse with Mrs. Cochran, had a venereal disease. I said that after I found the sperm present. I used a prophylactic treatment to prevent venereal disease. I did not keep a smear of that which I took from her. I did not suspect a venereal disease but I used the prophylactic as a precaution. I found no evidence of a gonnococcic condition or anything of that kind.

Redirect examination.

By Mr. Foreman:

On the day following the commission of this alleged offense on this lady I went some where with Carey Cochran and Mr. Foreman. We went to Bob White's home. While at that home with Carey Cochran and Mr. Foreman we got some wearing apparel there. We got a pair of pants and a shirt and some shoes, I believe: I am not positive about the shoes. Those clothes were delivered to the officers at Livingston.

[fol. 44] I did not make any analysis of any stains on the pants. The pants were carried over to the sheriff's department and left there.

Recross-examination.

By Mr. Rogers:

I said she had a wound on her hand. I do not remember which hand that wound was on. It was inside of the hand, but which hand, I don't remember. It was just sort of a cut crossways. I do not attempt to tell the jury that what I found there was from the defendant.

Witness excused.

Aubrey Riley, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Foreman:

My name is Aubrey Riley. I was sworn with the other witnesses when the court had me stand up here and hold up my right hand. I live on Mr. Carey Cochran's place in Polk County. I am thirty-five years old. I have lived in Polk County all of my life. I know Judge Maury. I do not know Mr. Roy Pitts. I don't believe I do. I have seen Judge Browder here, but I don't know him. I don't know Mr. Standford, over yonder. I know I don't know him. I know Mr. Holliday.

I said I was thirty-five years old. I farm. In August of last year I was living over on the lake on Mr. Carey Coch-

[fol. 45] ran's place, which was on the same place I now live on. I know where the Scarborough place is. I know where the Sprat farm is. I have traveled the road from Livingston to the Scarborough place lots of times. To tell you the truth I don't know how far it is from Livingston to the old Scarborough place, where Mr. Arthur Carlisle lives. It is about ten miles, I guess. I do not know how far it is, about, from Dude Cochran's place down to the Scarborough place.

I remember sometime in the month of August of last year, that Mrs. Cochran was supposed to have been assaulted down there in the river bottom. I heard about it, the next day after it is alleged to have happened. That was the day after it was done. On the day before this was supposed to have been done that night, I was picking cotton for my uncle. Some people call him "Bus" Riley (but his name is Joe Martin.

I know Martha Coachman. She is Bob White's mother. I know a brother called "Sonny". I know his other brothers and sisters. One is name Lizzie; and another one is named Nettie and the oldest one is Ethel May Lee. On the night this offenses is alleged to have occurred, Bob White was living and staying with his mother. I said I was picking cotton on the day that this offense is alleged to have happened that night. I don't know, sir, how far it is from where Bob White's home was then to where I was picking cotton but you could see the house because I was picking around the open. Bob White was picking cotton on the [fol. 46] afternoon before it happened that night. I don't know, sir, how close he was picking cotton to me, but I could not see him. I was in sight of him. I said I knew about this road that leads from Livingston to the Scarborough place. We was picking cotton on the side of that road. That was a gravel road. It is graded, with ditches on each side of it. On that particular day, picking cotton there in sight of Bob White's house, we could see automobiles passing up and down that road. The defendant picked cotton until night, that afternoon. To tell you the truth, I don't know about what time we quit picking cotton. It was something like sun down. It was before sun down. When we quit picking cotton, I went to Bob's mother's home. Nobody was there when I got there except his mother, his brothers and sisters. Bob was there. I ate supper there that night. I remember what we had for supper. We ate

some okra and some other things, and bread and parched corn. I know what the corn was parched in. It was parched in a frying pan. I do not know which one of the children carried the corn to the house that afternoon, if it was carried that afternoon. I don't know about what time we finished eating supper, but we ate supper by lamp light. It was not quite dark. We had a light. After supper, I took a "bathe", in a wash tub, in Bob White's house. The defendant, Bob White, ate supper there too, that night. When I went in the room to take a "bathe", Bob was then at the house. I finished my bathe and went out on the porch. [fol. 47] When I fixed my bed, Bob was not there then but which way he went I could not tell. He was not still there then. When Bob White left there I don't know which way he went out. I did not go right on to sleep then. I don't know, sir, how long it was after I went to bed before I went to sleep. I did doze off to sleep sometime. After I had been asleep I heard Bob White come back to the house. I know that because he went on to bed. He slept on the porch. The next morning, when I woke up, he was there on the porch. He was sleeping on a small—little iron bed on the porch. When this party came back and stepped up on the porch that night, I don't know how long he had been gone. I don't know what time of night it was. We didn't have no time piece. I didn't get up and look. I had been asleep. After he came in, I went back to sleep. I did not hear those automobiles pass. I was asleep and I didn't hear any automobiles pass that night. I know where William McGowen lived, on this particular night. He did not live between Livingston and where I stayed that night. He lived between where I stayed, and the Scarborough place. That is down toward Mr. Dude Cochran's house. I know where "Pez" or Milton Thomas was then living, at that time. He lived down toward Mr. Dude Cochran's, from where I stayed that night. I don't know about how far it is from where I stayed and from where Bob stayed that night, down to the Dude Cochran place. The next morning when I woke up I saw some water melon rinds. I saw a water melon up in an ash tree and the rinds was on the porch. I do not know—had those melons, for I was asleep. I do not [fol. 48] know what time they were brought there, if they were brought there that night. If he brought them when I came, I was not asleep then. I remember of him coming back. I didn't know what time that was. We didn't have

any time piece. Bob White's mother, Martha Coachman, is here. His sisters are here. His brother is here. Jack Harrison is here.

Cross-examination.

By Mr. Rogers:

I had not been there at the home of Bob White and his mother very long previous to this date that I speak of. About three or four days, I reckon. As to how I remember so well, what took place on that date it is because I remember it. The night before that, I was at his mother's house. The night before that, I was at his mother's house. I don't know what I had for supper that night. As to how come me to remember so well what I had to eat on this occasion and don't remember the other, well, I just remember it. As to whether I remember what I had for supper the night before, or the night before that, I do remember that we didn't have nothing. I will tell you the truth.

I know Mr. Foreman and Mr. Coker. I met them immediately after the trouble and gave them a statement. I gave them a statement. That is where they got "gathering corn" and what I had for supper. I told them then. Information concerning the "corn gathering" and the "flour gravy" and so forth, was given the following day to Mr. Foreman, because he came to my house the next day. I don't know whether Mr. Foreman went up to where the [fol. 49] dog fight was at the McGowen home. He left me and went some where. He went in that direction. I was not at the Cochran home and I "shore" don't know what examination of the premises he made there the next day.

When I went from the field that afternoon or evening, I don't know what time I got to the house. It was not dark. It was no long, after I got to the house that we had the flour gravy and the supper that I spoke of. Bob White was there and ate supper with me. Bob left the house after he ate supper. In the meantime I took my "bathe", and then retired and went to bed. I dropped off to sleep. When I went to bed, there was not any water melon rinds on the front gallery. But next morning when I got up, they were there. I didn't see but one water melon. It was in the ash tree. The rinds of the other melon were on the front

porch. Somebody had eaten some water melon on the front porch after I went to sleep. I didn't eat any. I knew where William McGowen's water melon patch was, I don't know, sir, how far it was from the water melon patch to where Bob White lived. It was nothing uncommon for people to get water melons out of his water melon patch. He never did object to it. When I got up and left the next morning, Bob White was asleep there. He did not seem to be alarmed or disturbed about anything. I did not eat any breakfast that morning. Bob was there asleep, right out on the open front gallery. He didn't seem like he was trying to run or get away from the officers. I said I did not eat breakfast there that morning. I don't know [fol. 50] whether Bob did or not I did not know that Bob was suffering from some sort of serious vengreal disease. If he had any, I didn't know anything about it. I have slept with Bob. I did not sleep with him on this occasion. As to who slept with Bob that night, he was by himself the next morning. I do not know who slept with him during the night. There was no one up and around the place when I left. Bob was asleep and I left early. I went to the field. That was in the same field where Bob had been working. We was all working in the same field. Throughout the summer time, some of the darkies go bare footed in and around the place. A good many bare-footed people walk that road from Bob White's house to the Cochran home. I have seen where barefooted tracks were made. It is not a fact that I would mail my mail in the mail box up there near the Cochran home. We have a box of our own. It is up on the hill from Bob White's home. That is not going in the direction of the Cochran home. It is the other way. I know where the grocery store is up there at the Cochran home. A good many darkies trade there. I think a good many darkies go bare footed.

Redirect examination.

By Mr. Foreman:

I wear number ten shoes. I have worn Bob White's shoes. He didn't have but one pair and that was white ones, low quarter, sharp togs.

Recross-examination.

By Mr. Rogers:

Lots of people wear sharp toed shoes. Lots of people [fol. 51] wear shoes like Bob White's shoes. I have worn those same shoes myself. He still wears shoes.

Witness excused.

C. L. COCHRAN, a witness for the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pitts:

My name is C. L. Cochran. Most of my friends call me Cary Cochran. I live at Livingston. I have lived there all of my life. "Dude" or W. S. Cochran is my older brother. He was also born and reared in Livingston, in that County. The Cochran family owns land—farms, west of Livingston. The Scarborough place that has been testified about here, is about twelve miles west of Livingston. That place was acquired by my father while I was a small boy, or before I was born. Ernest Cochran, my younger brother, owns the Scarborough place now. My brother Dude's place was originally a part of that tract. It was cut up. His home place. I would say is about three quarters of a mile to a mile from the Scarborough place. We have barns there where we keep our team and tools. I said it was it is about three quarters of a mile to a mile from that house over to Dude's home. Dude's house is east of the Scarborough place. In going from the Scarborough place to the town of Livingston, you pass Dude's house. The Scarborough house is right on the bank of the river, Mr. Carlisle lives [fol. 52] on the Scarborough place. He is the farm foreman. Mr. Carlisle has served us as farm foreman there, for nine or ten years. I don't remember just exactly. He is a man with a family. During the time he has worked for us, he has lived there on the place. There was one family of white folks living between the Scarborough house and my brother Dude's. They live on the Scarborough place. I believe there is one white family on his place too. There is telephone connection between Mr. Carlisle's house there

on the Scarborough place, and the town of Livingston. There is a phone in Mr. Carlisle's house. My brother Dude has a telephone connection to his house on the same line.

I know where Bob White's mother was living, in August, 1937. She was living on the road from Livingston to the Scarborough place. In August, 1937, I would say that Bob White's mother was living about something like a mile and three quarters from Dude's home. It was something around a mile and a half to two miles from Dude's house to Bob White's mother's house. Just guessing at it. Bob White's house is not any further from the road than from here to that door—to the ditch there—to the main road.

On the night that this defendant is charged with assaulting Mrs. Cochran, I learned of it, I would say, around ten thirty. When I learned of it, I was down at Mr. Fain's house in Livingston and Ernest called me and told me about [fol. 53] it and told me to meet him at the store and I jumped in the car and ran to the store and met him. As I started in the store I met Mr. Kimball in the street and I called him and told him about it. I then went on into the store and phoned Mr. Carlisle to go down to Dude's house and told him what had happened and told him I would get there as quick as I could. I phoned Carlisle when I went in the store. When I called Carlisle at his home, he answered the phone. He promised me he would go. After I had the telephone conversation with Mr. Carlisle, I saw him just as quick as I could drive from Livingston out there. I would say that was fifteen or twenty minutes. When I got there he was in the living room at Dude's house. My brother Ernest went in the car with me. Mr. Holliday and Mr. Kimble drove up there ahead of me just a little bit. I could see their lights as they drove in. They got to his house before I did. Mr. Holliday was the Sheriff. The Sheriff's car was ahead of me. When I got there, Mr. Carlisle had with him a lamp lighted and a shot gun. I stated that Mr. Holliday had already gotten there.

Cross-examination.

By Mr. Rogers:

I went to the Cochran home that night. When I arrived there, I found Mr. Carlisle there and my brother's wife and the two little kids were there. I think one of these boys

is about ten or eleven years old and the other one is about thirteen or fourteen. I would say about thirteen or fourteen. I don't know exactly. The boys were on the porch when I got there.

[fol. 54] Mr. Carlisle was in the living room when I got there. I stated that there was a telephone in the Scarborough home. That is where Mr. Carlisle stays. He lives in the Scarborough home. The Scarborough farm is now the Cochran farm. The Scarborough farm belongs to the Cochran estate—to we gentlemen. I phoned to Mr. Carlisle myself. My other brother, Ernest, phoned to me. I know who Ernest told me phoned him. No one phoned the sheriff. I saw Mr. Kimble in front of the store and told him to get Holliday and go on out there. I think that was around ten thirty at night. I saw Kimble, I believe it was about eleven o'clock, when I got out to the farm. I went by the store to my office where I got me a gun. I was not there when the sheriff got there. The sheriff was just ahead of me. I was there when he made a search for evidence in the house. We went over the entire house. The little boys were on the sleeping porch downstairs. As to whether the sheriff was in all the rooms when he made an investigation at the house, we were all in there together. The first thing I did was to get her back to town. The sheriff was making the investigation. I was there when they found the bare foot tracks, and put a tub over them to preserve them. I think the sheriff did that and went back afterwards and took a cast of that track. I was not with him when he did that. I never did see the cast. I was there when the finger print man came there but I had to go back to town. As to whether he searched the walls when he went up the stairs, I was there when he [fol. 55] came there but I didn't stay there to watch him. I was there when the blood hounds were brought over there. They were never released.

I don't know exactly how far Bob White lived from that place. I would say something like a mile and a half. From what I was told, I don't think it was over forty five minutes from the time the assault occurred until I arrived there. That is the best I remember. As to whether the sheriff was there when I got there, we drove up, you might say, together. The finger print man and the hound man did not arrive there immediately afterwards. The blood hounds got there first. The finger print man didn't get there until the next day sometime. Mrs. Cochran was

brought in to Livingston. She did not go into Livingston with me. Ernest, my other brother, took her to Livingston, to the hospital. Dr. Bergman, the Doctor who testified here a while ago is not my family physician. He does attend some of our family. He is one of the Doctors in the family.

A part of the road leading from Bob White's home to the Cochran home is graveled. A part of it is a dirt road. At the time I went to the house, Mr. Kimball was down there. In that house there was a living room, and bed room down stairs. It must be about a six-room house. When we got there both the front and back screen doors were unlatched. When I was there I don't think the boys were awake. I don't think they were up when I got there. My younger brother, Ernest, took care of the boys. As to whether I know who unlatched that screen door, Mr. [fol. 56] Carlisle was the first man who got there. The front door was unlatched. He went in before anybody else. There is an up-stairs to that house. There is one room up-stairs. I went to the room where the alleged assault was committed. There is not but one room up there. They used lamp lights in that house. Mr. Carlisle had a light in his hand when I got there. Mr. Holliday went up stairs ahead of me. I don't know whether he lit the light upstairs or my sister-in-law lit it. That was a moon-light night, but not yet real bright. It was a moon-light night as I recall it. Up-stairs, I say, they used lamps for light. They had shades on the windows upstairs. The shades were up, about half way. The windows that the shades were on, were some on the north and some on the south. I do not know what position the moon was in about that time of night. I would say it was a fair night. I stayed out there that night—the moon was—before day-light the morning was a bright night. In order to see and observe things in that house that night, Mr. Carlisle had a lamp. Naturally, the house was dark before the lamp was lit. Any one would not have to have a light or lamp to see what was in the house. I don't suppose you could read a newspaper in there, like that, but you could get around in there. The moon was shining enough that you could observe a chair or table or bed, or something like that. I would not undertake to say that this defendant perpetrated that wrong, because I was not there and did not see him. I am thoroughly familiar with the lay of the house, and the furniture and everything in the house. I

[fol. 57] am familiar with that because I have been there many times. I know pretty well.

I was with Mr. Foreman the following morning when he visited the Cochran home. I was there a number of times. I was back and forth down there. I was there a number of times when Mr. Foreman was there. I think he went into all the rooms there. I carried Mr. Coker out there. I don't think Mr. Coker went out there until maybe a month after that. It was just a day or two before the other trial. Mr. Foreman did not go there the following morning with me. I was out there when he came out. I went out the night before. I don't know who came out there with Mr. Foreman. I understood that after Mr. Foreman was out there at the place and observed what was in the house and went over it there, he went to Beaumont. I understood that Mr. Coker took Mr. Foreman to Beaumont. The purported confession was had at Beaumont.

Witness excused.

Mrs. Ruby Cochran, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Foreman:

My name is Mrs. Ruby Cochran. My right name is Ruby. I am the wife of W. S. or "Dude" Cochran. I have two [fol. 58] boys, ages fourteen and eleven. In August, last year, they were ten and thirteen. I live eleven miles from Livingston, in Polk County. During the entire month of August of last year, I was living at the same place. That was my home. I lived west of Livingston. We were living in the woods, out in the country. My husband is a planter. He farms. At this time we have lived at that particular place about three or four years.

I know a negro man by the name of Bob White, when I see him. I know his mother, Martha Coachman. I know where she lived on the 10th day of August, last year, with reference to where I lived, and with reference to Livingston. Bob White and Martha Coachman lived nearer to my home than they did to Livingston. Their home is closer to Livingston. Coming from Livingston to my home, I pass by where

Bob White then lived. It is about a mile and nine-tenths from where Bob White lived then to where I was then living. I have, in company with some one else, measured that distance by the use of the spe-dometer on an automobile. It is in the neighborhod of two miles. In going from Livingston by the home of Bob White, in a westerly direction, he lived on the right hand side of the road. He lived in about two or three hundred feet of the road, I think. It was not quite as far as from here to this door (pointing). To the back of the court room. The road we travel passes by where Bob White lived. It is a dirt road. I know where Bob [fol. 59] White, his mother, brothers and sisters were farming that year. They were farming across the road. In driving up and down that road in an automobile, I could see the land that they were then farming, or working in there. There was nothing between the road and the cotton patch except a barbed wire fence. You say that Bob White here, is charged with an assault upon me on or about the 10th day of August, 1937 in Polk County, Texas. That was on Tuesday night. On Monday before that, I was in Livingston at Ernest Cochran's residence. Ernest Cochran is my husband's brother. After I left Bergman's hospital I went down to Ernest Cochran's home, and stayed there several days. I know Mr. Arthur Carlisle. He is the foreman who lives on the Scarborough farm. The big house on the Scarborough farm is about a mile from our house. There is a white family named Morgan who live nearer to my home than Mr. Carlisle and did live there at that time. I don't know about how far they lived from my home.

In my home there are five rooms down stairs and one upstairs. Going in the house at the back door you come in on the screened porch and turn to the right into the kitchen. The next room you would go through would be the dining room. The furniture in the dining room consisted of a table, chairs and a buffet. You would go through the dining room into the living room. In passing from the dining room to the living room, there is a hall-way. It is about this size (indicating); about as wide as that is, or a little wider; from [fol. 60] that rail there to this one. If one had walked down through there at night, he would have had an opportunity to touch the dining table or the eating table. After going on to the front part of the house, after passing through the dining room, the next room is the living room. One walking from the kitchen into the living room, there are windows in

front of you. Toward the front of the house there are three windows. To the right immediately, in the same room, is a fire place in there. There are windows on either side of the fire place. After coming into the living room where I have said there were windows in the south and windows on either side of the fire place, after getting into the living room, if you were going up stairs, you would turn to the right. Near the landing of the steps going up stairs, there is a radio, a chair and a table. A lamp sets on that table. It is a little lamp; an oil lamp. The thing that holds the oil —body of it—is about this big round and it comes in like this and it has a shade on it about this big round and it has got a top. That room at this time is in the same condition with refeernce to the stairway, the furniture, the table and so forth and the lamp as it was on the night of this alleged offense. I was at my home last week when several of you came down there and I saw and observed some pictures made there, of my place; some photographs, I have seen those photographs here today. These pictures represent a true and correct description of the conditions existing in that house on August 10th, 1937. The picture which you now show me is a picture of my home. On the night of this [fol. 61] alleged offense, I was sleeping up here (indicating) which is the room up stairs. Just one room up-stairs. There are two windows there (indicating). There is not more than one room up-stairs. If you stand in that room looking out these windows, you would be looking south, through the up-stairs windows. Those windows are in the south, or front part of the house. There are two other windows in that room. They faced north. That is the youngest son standing by the car. The situation of the house and the furniture in the picture as made here is the same as it was on August 10th, 1937. On the night of August 10th, 1937, my two little boys were sleeping down here on the sleeping porch. That is on the south part of the building where I pointed to the solid porch. They were sleeping on cots—little narrow beds.

Mr. Foreman: We want to offer this in evidence, Mark it.

(Whereupon, the photograph just testified to by the witness was marked "S-2" for identification and was received in evidence.) (Here was received the testimony identifying "S-2", "S-3", "S-4", "S-5", "S-6", "S-7", "S-8", "S-9", "S-10", "S-11", "S-12", "S-13", "S-14", all of which pictures were introduced in evidence with the above identi-

fication mark, and testimony respecting said pictures and the pictures themselves are ommitted from this record.

[fol. 62] The Witness: This group of pictures (above referred to and described as Exhibits "S-1" to "S-14" inclusive) that have been introduced in evidence and passed over to the jury to inspect, represent the condition of certain parts of our building, my home, and lots and garage as they actually were, each and every one of them on the night of August 10th, 1937, last year. I saw these pictures made.

I spent the night of August 9th, 1937, in Livingston, which was Monday night, before this happened on Tuesday. I spent the night at Ernest Cochran's home. I believe my husband, W. S. or "Dude" Cochran, was at the farm that night. I had gone to Houston Monday. I was not at home Monday night, before this alleged offense on Tuesday night. I spent Monday night at Livingston with my brother-in-law and his wife. On Tuesday morning, I went home. I mean down to the farm, where me and my husband lived, some ten miles from Livingston. Ernest Cochran carried me down to the farm on Tuesday. That is the little man sitting over there. He took me to the farm in his Ford Sedan. In going down there, we traveled this road that goes by Bob White's home on that particular day, with nothing between us except the barbed wire fence. That is the only road down there that I know anything about. The main road stops when it gets to the river, within a mile or two of my house. Just a little road from there on out. In passing that farm where Bob White and his mother worked and lived on that day—Monday—I could see out across that field where negroes were at work. It was day time and I could see. I passed right along where Bob White's home was. [fol. 63] When Ernest Cochran carried me out to my home that day, he left immediately. My husband, Dude Cochran, was not at home. I hadn't seen Dude on Monday. I went to Houston Monday morning. I left the River bottom Monday morning. I hadn't seen Dude all day Monday after I left home. I did not see him Monday night. When I got back to the country Tuesday, my husband, Dude, was gone. I didn't see him all day Tuesday. I had not been in bed with nor had intercourse with my husband during that period of time. When I got home on Tuesday morning with my brother-in-law Ernest Cochran, a friend of mine communi-

cated with me. That was Mrs. Bergman, wife of Dr. Sol Bergman. She asked me to come there. She came for me after she got in touch with me. She came in her automobile. I went to her home in the town of Livingston. I remained in Livingston until late in the evening. I then went back to my home in the country down there. Mrs. Bergman carried me back. Her little boy was with us. I got home before dark. When I passed back, going home late in the afternoon of Tuesday I went by the same field and the same home where Bob White lived. If he or other people had been there any place in the field, they were close enough to the road to see me, with nothing but a barbed wire fence between us. Mrs. Bergman did not stay all night with me. She turned around and went right back. When I got home, my husband was not there. He was in Houston. When I got home I did not find the little children there. When I got home late this Tuesday afternoon, I went down the road to hunt them. I went out through a [fol. 64] little woods. I saw some negroes out there. My little boys were hunting birds with nigger-shooters. I got with the little boys. We walked on home. When we got back home, it was getting late in the afternoon. It was pretty late. The little boys' names are Laddie and Joe. Joe is the older. Before we went to bed, we ate some ice cream. We went out on the front porch. We sang a while. We sang some songs. We finally retired for the night. The little boys went to bed on the porch. Facing the house, they went to bed on the right hand side on the porch downstairs. After I got the little boys to sleep, I went upstairs. In going up the steps I passed by the lamp with the shade on it that looks like a water bucket. I then went on up the steps. There is just one room up stairs. When I got up there, I lighted a lamp. We did not have electric lights. We had oil lamps. The shapes were up. I said the shades to the windows were partially up. A person standing out in front of the house could see up in my room, with the light burning like it was. If a person went around the house to the north side where the two north windows were, with a light in my room, they could see me dress or undress if they would stand off far enough. The shades to those windows were pushed up to some extent. When I got up stairs, I should think it was around eight o'clock. It could have been earlier or later, but something like that. When I got up stairs, before I went to bed, I lighted a lamp and

pulled down the cover, and pulled off my clothing. I combed my hair and fixed my face, like ladies usually do. I was not [fol. 65] up long before I actually lay down in the bed. Something like twenty five or thirty minutes. I kept the light burning until I got ready to go to bed. I stayed up in the room around a half hour before I finally put the light out. I put on just one garment, to sleep in. That is what we ordinarily call a night gown. This gown did not have any sleeves in it. If you come into the room where I was preparing to sleep that night, standing in the door my bed would have been a little more to the right than to the left—, if you stand in the door looking toward my bed. It is kind of hard to tell how long I had been in bed before something unusual happened. It seems like I was there quite a bit; maybe an hour or an hour and a half. After I had laid in bed for sometime, I don't know exactly how long, something happened before I went to sleep. The first thing I noticed that attracted my attention was some skreaking; you know, like when you step on a board. I heard little sounds like a board squaking. They were little sounds like boards squaking or skreaking. I listened to them. It seemed like a good little bit. I was just listening. I was afraid. And next I heard a sliding noise. I didn't do anything then. Then my bed shook. I was on an iron bed. It was not a solid bed. It was just an iron bed without any boards. You could see through it. The windows were at the head of my bed. I imagine my head was within a foot of the closest window. The shades were up, however. After I heard the sliding noise and my bed shook—after I heard the sliding noise, [fol. 66] I waited awhile. I thought that maybe it was one of my boys coming up and then my bed shook and I said "Hey, is that you"? Well, then, some one leaped on me. I was still on my bed then. When whoever that was leaped on my bed, they did so from the side next to the wall. The way they came in, if they walked up to the foot of the bed, it would be to their right. Whoever this was came into the room and leaped on the bed. Naturally I was afraid. There was a struggle and I jumped off on my right and screamed and ran and tried to get away and so I just saw the outline of the window and then I tried to go through the window. I hit the window with my head. I was about half way out when the person grabbed me up here and pulled me back. He grabbed me up here by my waist. He grabbed me here (indicating on Ernest Cochran's body) and pulled

me like that. He grabbed me under my arms and around the waist. As compared to the size of Ernest Cochran, the man who grabbed me was about his height. He was muscular as to his makeup. When this party grabbed me there under the arms, from the back, I saw that I could not kill him and that I could not get away; so you think fast in a moment like that and I knew if I screamed again I thought maybe the boys would come up and they were too young to help me and I tried to talk to him. I said "do you know what the Cochran's will do to you"? He says "I don't give a god dam what they do to me". I then says "don't you know what will happen to you". He says "I don't give a god dam what happens to me", and about that time we had [fol. 67] struggled nearly to the stove and I reached for one of his hands, and I felt a knife; so I was scared then. The knife was open. Then I got to thinking, well "I must not die" because he might kill my boys, so I struggled longer and he kept cursing me. "Mostly "God dam". And over and over he would say " if you scream, god dam you, I will kill you". He said "If you tell, god dam you, I will kill you". And then we back to the window and I knew I had better live because I could not get help and then he threw me on the floor. When he threw me down on the floor my feet were nearest to the door that he came in. At the time he threw me down on the floor, I had, at that time, already felt the blade of a knife. My hand—these two fingers—were injured, in the struggle. When I grabbed the knife, I turned it loose. The knife cut me across here. I did not have any other cut places on my hand. When I jumped through the window, this knee hit the window facing and bruised it. In falling, it was strained. He then held the knife on me here. At that time the knife was open. But I pretended to faint, because I didn't want to be—well I didn't want to be conscious. The shirt sleeves of the party who held me down there were rolled up high. He had no neck tie on and his shirt was open to about here and I noticed all of those things because I was pushing on him. That party did not have on an undershirt. As to whether that party had recently been shaved or otherwise, well, his face was slick. That is my opinion. The party was scuffling there with me in my bed room did not have on any shoes. I know that [fol. 68] because I felt his feet. His breath was very, very offensive. This party actually had intercourse with me. This particular party placed his male organ in my female

organ. This party who had intercourse with me there that night did not have my consent to do that. This transaction took place in Polk County, Texas, on or about August 19th, 1937. I was fraid of this party when he was there with the knife turned on me or drawn on me.

This man who came there that night and raped me was bare headed. Before August 10th, 1937, we operated a little store there in behind our place. We sold lard there.

When this party came into my room that night I had a pistol in my hand but was afraid to shoot. I lay on the bed like this with the gun in my hand. I kept it in my hand then and asked him " who is this" and then when he leaped on me, well I lost the gun? I heard the gun fall at the foot of the bed, on the floor. After this occurred I was afwully afraid and I was still too scared to move and he got just to the door and he turned around and came back and laid his hand over my face and I was scared breathless. He put his hand on my face here and then after I heard him go down the steps—I could hear when he got to the turn. Well, I crawled over to where I heard the gun fall and went around on the floor until I found it. I picked it up off the floor.

There is a rug on the floor in the living room. In going up [fol. 69] the steps, after you get above the beaver board, the walls are papered. A moment ago I said he touched my face and head. He also touched my chest. I said a while ago I was afraid to shoot. I was afraid it was one of my boys. Lots of times they came up in the night and I don't know who they are and they come and wake me.

This person who raped me on the night of August 10th, 1937, was undoubtedly a negro.

Witness excused.

(At this juncture, the State rested its prima facie case.)

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[fol. 70] Martha Coachman, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Rogers:

My name is Martha Coachman. I will tell the truth. I live down on Mr. Carey Cochran's place, on the farm. This is my son that is on trial here. His name is Bob White.

Bob was born in 1910. That would make him about twenty-seven years old now. On the date that the alleged crime was committed out there on Mrs. Cochran, I was living at the same place. My son, Bob White, was living with me then. I was picking cotton on the day of the alleged crime, with Bob White and my children, Nettie and Lizzie and Sonny Boy. I have got four children there with me. I am the mother of thirteen children in all. Bob White stayed there that night. He left the field that day and went to my home just a little before sun down. Me and my children and Bob went to my home with me. It was not dark when we got home. Immediately upon reaching my home, I cooked supper. My son, Bob White, ate supper there that night. It was about dusk when we ate supper. We ate by lamp light. Bob did not go somewhere after supper, no more than to the water melon patch, of William McGowen. I could not tell you how far that was from where I lived but it was not far. He was not gone long. He was not gone longer than a little while. No longer than to go to [fol. 71] the patch and get the melons. He brought two melons back with him. He cut one and we ate it and he put the other one up in the fork of the ash tree. Aubrey Riley ate some of it. He was rooming there at that time. He put the other melon up in the ash tree; to stay cool until the next morning. Bob White got up next morning and ate it and went on to the field. That night after we got through eating the water melon we set up for a while and then he went on to bed. He bed was on the porch and he laid down awhile until the "skeeters" got to biting him and he came into my room. Bob White never left the house any more that night. I am his mother, and if he had life I would have known it. Bob was there next morning. Bob, my son, was there the next morning, at my home. We did not eat breakfast in the usual way, He just cut the melon and went on to the field, and worked that day, which was the following day. Bob was in the field picking cotton when he was arrested by Mr. Holliday. Mr. Holliday took my pocket knife from Bob. My boy got that pocket knife that morning. He did not have that knife the night previous. That was my knife. He got it the following morning. Some of the Laws came to my house the following day, They came into my house. They took some clothes from my house. They did not read any papers to me. They did that in my house. As to whether I gave

them my permission to come in, they asked about the clothes, and the children invited them in the house and they came in and told the children to get up and give them to them. [fol. 72] They were on the porch before I saw them. I recall what I gave them. I gave them a white looking shirt—just sorter of like a white broadcloth shirt and I wore it to Blanchard and it came a storm and it had a brown place up and down the bosom. When these men came to the house I did not give them no permission to come in. I just let them come in. They was on the porch when they "hello" me. I know some of the people that I live on the road from my house to Mrs. Cochran's house. There is William McGowen and Bodeless and Rob; then there was Peter McGowen and Water McDade's and Windom Wells and Mr. R. Q. Dillon and Fred Johnson and Mr. Kirkpatrick and Mr. Weldon Shaw and Mr.—let me see; and Mr. Homer Howell, is all I know. I say Mr. Homer—I don't know his other name, but Mr. Weldon knows. All the people I have named up in where I live are colored people but Mr. R. Q. Dillons is white. All of these people I have named, raise cotton, too, just like I do. They farm on out to the highway. Between my house and the Cochran home, there is a road, and farms and mail boxes. There is a barbed wire fence around them. There is nothing between the highway and these other farms except a barbed wire fence. As to whether or not it is thickly populated with colored people in that community and as to whether or not a good many negroes live there, no more than cousin Joe Buss, and Tony Johnson and William McGowen, is about the closet to where I live at.

Cross-examination.

By Mr. Foreman:

My house is right at the road. It ain't as far as from [fol. 73] here to that wall over there; shore not. On the day following the assault on Mrs. Cochran, I heard about it I do not remember Bob, my boy, saying to me there that night "here goes Mr. Carey's and Mr. Holliday's cars and when Mr. Carey comes back I am going to stop him and tell him about the cotton" and ask them how come them to charge $1.20 a bale for hauling my cotton. I do not remember Bob telling me that. William McGowen was charging cousin Joe for hauling cotton and I didn't like

that. He did not tell me that night that Mr. Carey had passed there in a car and he was going to stop him when he came back and tell him why he was charging $1,20 for hauling cotton. He did not tell me that. I said I was not going to pay it because I knew it was his place to furnish us teams so I could haul it myself and I hauled it myself. Bob did not tell me about Mr. Carey and Mr. Holliday passing there in a car. I swear that. No sir. He shore didn't tell me. He did not tell me he was going to stop Carey when he came back by there, and tell him about that and tell him it was not right. That didn't happen.

We all went home from the field together that afternoon. That means me and Bob and my children, and Aubrey Riley. Aubrey Riley is a colored boy with bushy hair. He went home with us too. The next morning when we got up, Aubrey and Bob and all of us went to the field together. I went myself. I said I and the children went to the field together. I said that Aubrey and all of us went off together. I went along with the crowd except Lizzie and [fol. 74] Mary Lee and Rose and her two children. I left right after they left. Aubrey Riley did go with us to the field. But he was not working for me. He did go with us all to the field. He walked right along with us. He did not go to the field ahead of me.

When Bob came home that night, he went and got some water melons. I am not able to tell you what color they were. I know they were water melons and we ate them. I don't know what sort of meat it was. I know it was just red. I am pretty sure they had seed in them. Bob White cut the melon with a Texas knife. No, it was a case knife. He didn't cut but one. Those who helped eat the melon that night were: myself, and Bob White; and Aubrey Riley and Willie G. Coachman; Nettie Coachman; Rose and Mary Lee. As to whether we had all of the water melon we wanted to eat, we didn't have all we could eat but he would not cut the other one. The next morning we cut the other water melon. He cut it with a case knife; there in the house. Bob White went out to the China tree and got it. Aubrey Riley helped us all eat it, next morning. We did not eat anything else for breakfast. After we were through, we went on to the field. That is true.

I said the mesquitoes were bad out there on the porch. Bob came in the room where we were. We slept in the

room next to William McGowen's, which was west. I slept in there and Aubrey Riley slept there. When Bob [fol. 75] came in he made a palate right down by the side of my bed. When Bob came in, I did not look at a watch to see what time it was. I do not have any idea what time it was. I do not know how long it was he had been asleep out on the porch when he came in. I- was not so long. It was not as much as three hours; nor two hours. He said he had to come in because the mesquiters bit him too hard. There was nothing to keep them from flying in through the door, and coming into the room. When I got up the next morning Bob was laying there on a palate on the floor. Aubrey Riley was laying down but we all got up together. Aubrey got up the same time I did. Bob got up too. Bob did not go to the field with us all. Bob was not sleeping out on a spring cot on the front porch when I got up. He was in the house. He was laying on the floor on a palate like I said. That is true.

That Texas Jack knife handle was sorter striped. A pretty little knife with a little bit of a curl. I would know it if I would see it. The knife you now show me is shore hit. That is the knife that I gave Bob out there in the field that morning. One of the girls handed it to me and I handed it to him. She gave it to me. She told me she would keep it. She gave me the knife and I handed it to him, out in the field. Bob had a pair of white, sharp-toed shoes at that time. I don't know about the sharp toes but he had a pair of shoes. They were not plain toes. Bob wears a ten I think. I think it was a size ten.

Redirect examination.

By Mr. Rogers:

I saw the knife the next morning. It did not have any [fol. 76] blood on it.

Witness excused.

Jack Harrison, a witness called by the defense, being first duly sworn, testified as follows:

Direct examination

by Mr. Rogers:

My name is Jack Harrison. I live in Houston, in Harris County. On or about the date of the alleged assault on

Mrs. Cochran I lived in Polk County. I know Mr. Holliday, who used to be Sheriff up there. I was arrested and placed in jail. I stayed in jail right about nine days, I believe. Bob White was in there at the same time I was. I was put in jail on the 11th and I was placed over in one cage and the other boys was in another cage and they taken me out of that cage and brought me down and put me in a cage with Bob White. I don't know what kind of shirt Bob White had on when he came in the jail. I don't know what kind of shirt Bob White had on when he got out. I saw him in jail. I don't even know what kind of a shirt I had on. That is true. I do not know of Bob being taken out of that jail. They took me out. I don't know whether Bob was taken out of Jail or not. I do not know when he went to Beaumont. I don't know when the Texas Rangers took him out if they did take him out. I have not talked to any one about this case. The Rangers haven't talked to me. They did not talk to me out in the hall. Mr. [fol. 77] Williamson did not talk to me, yesterday. I talked to you yesterday. I did not tell you then this man came in there with a blue shirt on.

Witness excused.

SHERIFF MITCHELL, a witness called by the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogers:

My name is Sheriff Mitchell. I am Sheriff of Walker County, and was such in August of last year. On or about the 10th of August of last year, I got a call to come to Cold Springs and I would be met there. I just don't believe I could tell right now who met me there. I know all the Cochran boys but I don't know their names. They met me there and took me and the dogs in a car. I had two dogs. We went to the river and crossed the river on a ferry and they was to meet us on the other side with a car and they did not and we had to walk. They met us just before we got to the Cochran farm. We stayed there off and on—we was away part of the time—but we stayed there until up about noon that day. I saw some tracks near the Cochran home. Bare footed tracks and other

tracks. They seemed to be fresh tracks. Just as soon as I got there, that is, pretty quick after I got there, we begun to follow some tracks and we followed some tracks away from the house and back to the house. I never did [fol. 78] turn those dogs loose on those tracks. The dogs were blood hounds. The State uses them in their convict work at Huntsville. I would think they are trained. They are used for the purpose of tracking people. Those dogs are used for running convicts when they get away from prison. I would not think there was any difference in convict tracks and any other tracks. I would not think there was any difference in the scent. When I got there to this place with those dogs, Mr. Carey Cochran and Sheriff Holliday were with me there. And I believe a Deputy Sheriff was there and maybe—well, there were several others there. There were several people there. It must have been about three o'clock when I arrived there. That was in the morning. It was right close to three o'clock; a few minutes of three. I think Mr. Chancey, of Lufkin, was there. I saw him there. I saw him do just like the rest of us did. We were all doing some tracking around there. He did not make some finger prints while I was there. He made some finger prints but I didn't go in where he was making them. I was out on the outside tracking. I seen him come there for that purpose but I didn't come while he was making them.

Direct examination Continued.

By Mr. Johnson:

As to whether the endeavor that was made at that place with the hounds led to the home of Bob white, I did not turn the hounds loose. I made an endeavor to follow the tracks; the bare footed tracks. I would think that a bare footed track is the best track for a dog to scent. [fol. 79] I did not know where Bob White lived. Only from hearsay did I know he lived in that neighborhood.

Cross-examination.

By Mr. Foreman:

I cannot tell you the names of those dogs. They were not my dogs. They belonged to the State.

Witness excused.

LAVENIA TERRY, a witness called by the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogers:

My name is Lavenia Terry. I live at Onalaska. I do not know anything about this case. I was here all the time but I didn't know anything about it. You have not had a chance to talk to me. I was at home that night.

Witness excused.

NETTIE COACHMAN, a witness called by the defense, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Rogers:

My name is Nettie Coachman, I am thirteen years old.

Direct examination continued.

By Mr. Johnson:

My name is Nettie Coachman. I am a half sister to Bob White. I live in the bottom back up in Polk County. [fol. 80] I live with Martha Coachman. She is my mother. I remember the occasion about a year ago when the disturbance was on in the neighborhood about an alleged assault on Mrs. Cochran. Aubrey Riley was living at our house with me and my mother at that time. Nobody else. At that time, Bob White was on the gallery at our house. I saw him that day. I picked cotton with him. After we picked cotton we didn't do nothing else. From the cotton patch we went to the house. When we got to the house we cooked and eat. After that, I went to bed Bob White was there at the time we até supper. He ate with us. That night before I went to bed we had some water melon to eat. Bob White brought the water melons. After the water melon was eaten, I went to bed. There were two melons. We ate one that night. The other one was put in the China tree. I went to bed before Bob White did, and then he went to bed after I did. I know

about him going to bed. He slept on the gallery until the skeeters got to biting him and then he got in the bed,—another bed. I am sure that is the night that the alleged assault was made on Mrs. Cochran.

Witness excused.

LIZZIE COACHMAN, a witness called by the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is Lizzie Coachman. I don't know how old I [fol. 81] am. If I tell a story I don't know what will happen to me. I have never been told what will happen to me if I don't tell the truth. I do not know that it is right to tell the truth and wrong to tell a lie. I do not know my age. I have forgotten. If I was asked any questions here at this time my answer would be true as to some things but some things I don't know. Those things that I do know about, I would tell the truth about it.

I live on Dave's place. That farm is Mr. William McGowen's. I live with my mother, whose name is Martha Coachman. I do not remember anything about a year ago, something happening to Mrs. Cochran.

Witness excused.

WILLIE G. COACHMAN, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogers:

My name is Willie G. Coachman. I live down in the bottom. My mother's name is Martha. I know Bob White. He is my half brother. The night Mrs. Cochran is alleged to have been assaulted by some one I was living with my mother close to Mr. William's house. On the day before the night on which Mrs. Cochran is alleged to have been assaulted, I picked cotton. I was picking cotton for my

self. Bob White was picking cotton that day. We left the field about twelve for dinner. When we quit work for the [fol. 82] night I left the field about dark. I went to the watermelon patch. From the field, when I left the field, I went home. When I went home I stayed there until after supper. I ate supper with my mother; and with Bob White. Bob then went to the watermelon patch. He was not gone long. He brought some watermelons back to the house. We ate one and laid the other one in the China tree until the next morning. We then got up and eat it. After we ate the watermelon that night I went to bed. I did not see Bob White go anywhere. He never did leave the house that night, any more.

Witness excused.

Mary Lee (Colored), a witness called by the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is Mary Lee. I have been married. Before I married my name was McGrew. I am related to Bob White. He is my brother. I live with my mother. At the time of the alleged assault upon Mrs. Cochran, I was staying with my mother. The others living with my mother at that time were: Aubrey Riley; he was staying with her. Bob White was there. I picked cotton. All of us was in the field that day, picking cotton. After we finished picking cotton that day we went on to the house; to my mother's house. We then cooked supper and went to bed after [fol. 83] we ate supper. I went to bed early. I did not go to sleep as soon as I went to bed. I stayed awake a long time. Bob White was there when I went to bed. I don't know exactly about how long I lay awake. I stayed awake, you know, a pretty good while. Bob did not go to bed before I went to sleep. I went to bed and if I ain't mistaken—we had some watermelons to eat that night, at the house. I try to tell the trufe, yes sir—a good one. Bob White brought the watermelons to the house. After Bob brought the watermelons to the house, I will tell the trufe, he did not leave the house that night. I did not know where he first laid to go to sleep.

Witness excused.

ED GOREE, a witness called by the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is Ed Goree. I live at Houston. I know the defendant in this case, Bob White. Bob White lived with me in Houston right around two months I guess. It was in June up until July—about the last, I think, of July, of last year. I never did see him after he left my house until I came over here. I — know whether he had a sickness at the time he lived at my house in July, 1937. As to whether I know what it was, I called it gonorrhea. I don't know what it was.

[fol. 84] Cross-examination.

By Mr. Foreman:

I live in Houston. Mr. Rogers lives in Houston. I don't know about Mr. Johnson.

Witness excused.

BOB WHITE, the defendant herein, being called by his counsel, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is Bob White. I am the defendant in this case. I did not assault Mrs. Cochran on the night of August 10th, 1937. I never did assault any white woman. At the time of the alleged assault on Mrs. Cochran, I was suffering from a disease. At that time, I was not able to have sexual course with any one.

On the day of the alleged assault, I was working on Mr. Carey's place, with my mother. I was living with my mother. On the night of August 10th, I left the field a little before sundown. The sun was setting. From the field, I went to the house. There we cooked supper and ate supper. I went to the watermelon patch and got two watermelons. The watermelon patch was William Mc-

Gowen's. I was gone about thirty or forty minutes. I came back to the house and cut one of them and we eat one of them and I put the other one in the china tree. I put the melon in the tree. Those there were me and my [fol. 85] sister and mother and Aubrey Riley. I went to bed at my mother's house that night. I went to bed on the porch and laid there for about thirty minutes and the "skeeters" was so bad I got up and went in the house. The skeeters were worse out there than they were in the the house, with the smoke inside. I remained in that room that night. I did not go back on the gallery early in the morning. I was not on the gallery early in the morning. When they got up they cooked breakfast—I mean they cut the watermelon and we ate the watermelon and went on to the field. I was in the field until about nine o'clock. About eight or nine o'clock, Mr. Ernest Cochran told me to be on the turn-row when he came back up there, from going to Mr. Willie Windham's place. I was there when they came back. I went to the fence and got through the fence and he told me to hang on the car fender, and he took me to Dude's house. That is, to Mr. Dude Cochran's house. I was not taken to jail then. I was arrested that Wednesday morning about nine o'clock, I reckon. Nine or ten o'clock. That was about the time they came up there and got me out of the field. They never did turn me loose after I left the field that morning. From Mr. Dude's house, I went to the Livingston court house. From the court house I went to jail. I was in the court house long enough for them to finger-print me. I remained in jail over there about seven or eight days. During that seven or eight days, I was taken out of that jail four nights straight. I can tell you which nights they were, with reference to whether the first, or other nights. I was [fol. 86] taken out on Monday or Tuesday one. I was arrested on Wednesday morning. I was not taken out on that Wednesday night. I was taken out Thursday night and three or four nights in a row after that. The first night they took me out I don't know where it was they took me to. It was way up in the woods somewhere. I don't know where it was. While I was out in the woods there was something did to me. Them Raugers whipped me. I don't know their names. It was the men who took me out of jail. I don't know what they whipped me with. I would call it a piece of a rubber hose. It was something

I thought was a rubber hose. They had me out that night about an hour or an hour and a half. They had a conversation with me. They asked me what was I going to tell when I went back to jail and I asked them what is it; I tell the truth and they told me I better not tell about them—that they had me in the woods and I told them I would not. They asked me where I had been to say they had me there at the court house questioning me. I have seen some of the men in this court room here during this trial who were with me when I was taken from jail. I was out that night about an hour and a half; something like that. I was hand-cuffed during that time. My hands were not loose that night. I was hand-cuffed. He had me hand-cuffed. I said I was taken out on another night. They whipped me that night. I have seen some of the men in this court room at this trial who were with me that night and took me out of jail. That night, I was [fol. 87] out about a half hour; something like that. Every time they taken me out they whipped me and every time they carried me back to jail they told me I better not tell it, about them having me out of there I did not have any conversation about any statement I was going to make. He asked me was I going to sign it. He says you know you did it. He says you just as well say you done it. He says if you don't say you done it we are going to kill you any how out in the woods. I don't know about how long that was before they taken me to Beaumont. About two or three days before. They took me to Beaumont about three or four days after they got through with whipping me. They whipped me four nights. My hands never were loose on these occasions when they would take me out. They had them like this, handcuffed. The third night they took me out they locked me to a tree and handcuffed me to a tree and told me to get out of my pants. I had to get out of my pants because they told me to. After I got out of my pants they handcuffed me to a tree and whipped me. At that time something was said to me about making a confession. Well, he asked me, he says you ain't going to say you did it and I told him no, sir. He said then you are going to say you did it when we git through wid you. I told him I was not going to say I done it.

I was taken over to Beaumont. I had a pair of handcuffs on me over there, and the Ranger lost his key to the

handcuffs out in the woods and that is when he phoned Mr. Willie to bring a key to take the handcuffs off and [fol. 88] he could not come, and the gentleman right there, Mr. Coker, he made that statement. I mean he wrote this statement down and asked me, he says "Can you read" and I told him no sir. Well, he wrote it, and he didnt' read it at all. He asked me if I understand it. I told him no, sir, I could not understand it. They had been talling me "it ain't notliing". I did not know what was in that statement at the time I signed it. I never knowed. I never signed it. I ain't never signed it. I did not make a mark on it. I did not see anybody hold the pen at the time the mark was made. That was on Saturday night and I remained over in Beaumont until Sunday evening. I don't know what day of the week it was I went down there. I don't know what day of the week it was when I was there. They held me from Saturday till Sunday while they were making the statement there. I do not know what day of the week I left Beaumont. I cannot read nor write. I went to school mighty little. I heard this statement read here this morning. I cannot understand all of the words that are used in that statement with reference to words that I am alleged to have used; in making that confession. While I was in Beaumont, I was not given an opportunity to get an attorney or a lawyer. I knowed no lawyer. None of my people were there. Those present when they had me there were: Mr. Zimmie Foreman; Mr. Ernest Coker; and Mr. Holliday and Mr. Davenport; that is what I call it. A ranger was there. I don't know his name. It was the short man here who has been sitting along side of me; a kind of a chubby man. I am not sure what his name is. They [fol. 89] called him Mr. Davenport. I don't know what his name is. No one ever told me that I didn't have to make a statement. No one ever told me that if I did make a statement it could be used against me. I never did voluntarily make any statement to anybody stating that I assaulted Mrs. Cochran, on the night of August 10th, 1937. On that night I did not at any time go any closer to the Cochran home than the McGowen water melon patch. I was not on the Cochran farm at any time that night, no more than where I was living at. I did not know whether Mr. Dude Cochran was away from home that night. I did not have any information as to who was there. I have never been in the Dude Cochran home. I never have

voluntarily told any one that I assaulted and had intercourse with Mrs. Cochran. I never did tell any one that I did do that. The reason I never did tell any one that I did it was because I knew I didn't do it. I knew I was not guilty of the crime. What was the use for me to say I done it when I didn't.

This knife that has been introduced in evidence here is not my knife. It belongs to my mother. I had that knife on Monday. I just had it in my pocket that Monday and carried it to the house that Monday evening or night. I gave it to my next oldest sister. I took it home that night and gave it to my next oldest sister. She brung it to the field on Tuesday morning and gave it to my mother and my mother gave it to me in the field. That is why I was with it that Tuesday morning. I never at any time held [fol. 90] that knife over Mrs. Dude Cochran or Mrs. Ruby Cochran and threaten to take her life with it. I do not have any idea as to who did go to her house as she has testified here.

Mr. Johnson: Now then, if it please the court if you will have the Rangers and Sheriff Holliday come in I will be glad to have this defendant identify them.

The court: All right.

Mr. Rogers: Bob, you are not scared to point out these men, are you?

Bob White: No, sir, I ain't scared.

Mr. Rogers: And will do so, if they come in?

Bob White: Yes, sir.

Mr. Johnson: Bob, the officers who came to the jail and took you out to the woods, did they have their hats on or off?

Bob White: They had they hats on.

Mr. Johnson: Then, we ask that the officers put on their hats.

The Court: All right.

(Whereupon certain persons retired from the court room, and came back with hats on)

Mr. Johnson: All right Bob, will you please point out which of these men came to the jail at Livingston and took you out of the jail as you have testified to; point them out?

Bob White: That one and that one.

Mr. Johnson: This gentleman here?

Bob White: Yes sir.

[fol. 91] Mr. Johnson: Mr. Davenport?

Bob White: Yes, sir.

Mr. Johnson: What others?

Bob White: What's the other one there?

Mr. Johnson: The one next to him?

Bob White: Yes, sir.

Mr. Johnson: Mr. Williams?

Bob White: Yes, sir, and Mr. Coleman Weeks. Sheriff Holliday was not with them. This (indicating) is the other officer I had reference to. Those are the three men who came there and took me out of jail. During the time I was out there in the custody of these officers I was struck on the head. I was hit on this side. I can't hear good at this time, now. I do not know what I was hit with. I do remember what, if any, discussion was had between these officers or among them about a reward that Mr. Bud or Dude Cochran or some of them had offered for the arrest and conviction of some one connected with this lady. I am not mistaken about the officers that whipped me. They are the ones. All three of them went to Beaumont with me. These officers whom I have identified had fire arms on them on all of these occasions. They had a shot gun and rifles—automatic I reckon you call it. From Beaumont he brung me here. I mean to this jail. They brought me to Conroe, Texas. From Conroe, Texas, they took me back over to Livingston and tried me over there. I have also been in jail in Harris County. And then I was brought back here for this trial.

[fol. 92] Cross examination.

By Mr. Foreman:

I am going on twenty eight years old. I was born in 1910, on March 15th. I have lived in Polk County all of my life. Milton Thomas is from Polk County. Just before this alleged offense, I had been in Houston. I did not come here from Houston on June 19th, but I did come in June. I don't know when it was but it was after June 19th. As to whether I have a girl named Hester Profit who lived at Mr. Jett Brooks' in Livingston—I know a girl named Hester Profit. I don't know whether she used to stay in Mr. Jett Brooks' servant's house. I used to go see her.

I have been knowing you a long time. You and I have been off on camps and I have cooked for you. I have

cooked fish and birds for you. You and I never had a word between us in our lives, except pleasant. You never mistreated me in your life. You never said a harsh word to me in your life. Ernest Coker never said a harsh word to me in his life. He has always treated me courteous, fair and right. These times that I claim that somebody carried me out somewhere down there and whipped me, I don't tell anybody that Ernest Coker was with them. I didn't and don't tell anybody that you were with them. I didn't tell anybody that Sheriff Holliday was with them.

I have five uncles at Houston. One of them is Ed Goree who was up here a while ago. The last time I went to Houston, I went down there with a boy called Sam Grace. We went in a little old ordinary "Shivvys pick up". I [fol. 93] don't know some other boys that were with me. I don't know who some of them are. Narry one of my brothers went with me. Son Grace was one of them, and L. C.—I forgot that boy's name. It was not L. C. Cooper. He lives out at Blanchard. It was not L. C. De Wall. He was a litle old chunky fellow, and a boy named Frank.

The last time I went to Houston, I stayed down there two months, I reckon. I don't know what month we went down there but it was last year. To tell you the truth, I don't know whether it was after Christmas. I worked while I was down there. I did not work down there at a junk place. I worked at a creosoting plant, with my uncle, Ed Goree. I said I left Houston in the month of June of last year. To tell you the truth I don't know whether it was after the 15th—after the middle of June. I said it was after June 19th, I don't know, Mr. Zimmie, how long after, to tell you the truth. When I came home I came with my Brother Edgar. That is not the one they call Snap. I was in his car. The car was a Ford. Those who came with me was myself, and him and Sammie Branch. That is all. When we got to Livingston, I got off and went home that day. I did not spend the night in Livingston, with Hester profit. I don't know whether Hester Profit was working for Mr. Jett Brooks or not. I went on home. I did not come back to Livingston the next day. I didn't come back there until Saturday. I did not see Hester Profit when I came back there on Saturday. I never did see her. I saw her after I came back to Livingston on June 19th. I saw her in Liv- [fol. 94] ingston. I don't know what time it was, but it was after I came from Houston. I never did go to that servant's

house and spend the night or part of the night. As to whether I can explain to the jury how any one in the world, or how you would know that I went with Hester, I told you I went with her but I didn't know you put it in the statement. Mr. Appleby did not read that to me. He read it, but I did not understand what he said.

When I came back from Houston, I said I went on home. I came back on Saturday. I did not go around Hester Profit. I did not stay around Livingston a few days. I worked out there for Mr. Windham. From June 19th to the date of this offense, I did not stay around Hester any, at night. I used to work for Mr. Ramond Windham and Mr. Carey Cochran. They had some teams and I hauled some, and a bunch of colored boys. I had been knowing Mr. Dude Cochran all my life. I knew Ernest. I knew Carey mighty well. I knew Mrs. Dude Cochran when I saw her. I knew Mr. Dude Cochran's home when ever I saw his house, when I passed there. I lived on the side of the road that led to his place. I knew Mr. Ernest Cochran's car too. I knew Mr. Holliday's car, the one that had a spot light on it. I could not tell you of any one else who had a spot light on their car. I can't tell you any person at that time who had a car with a spot light on it.

On the day of this alleged offense I was picking cotton,—on August 10th, 1937. I quit picking cotton late in the after-[fol. 95] noon and went down to where some fish was. No one was there but me and my brother and another boy. I did go down to where some fish was. I went down on the farm. I said "farm", not "pond". Nobody was down there. My brother was there and this boy "Nervy". I don't know his other name. That is the boy that was called in here. I saw him yesterday. We did not catch any fish that day. As to what we did about getting bait for hooks, we went down there to muddy the water but I didn't muddy it, because it was too late in the evening. When I left there I came back to the house. My folks had come in with me from the cotton patch. When I got home I went down to the pond to muddy it but didn't do it. I then went back home. When I got back home it was about dusk-dark When I got there, it was necessary to have a light in the house. I had not been there long before supper was fixed. About five minutes, I guess. I ate supper at the table. For supper I ate some corn, some biscuit and flour gravy and some okra. We didn't have no peas. I did not tell you and

Mr. Coker that I had that, down there because you never asked me. You ain't asked me what I ever had for supper. I did not tell you that. I done told you I didn't tell you that at Beaumont.

It took me about five minutes to eat supper. I then got up and went to the water melon patch. Nobody went with me. None of my folks had been to the water melon patch that I know of. There was no water melons at my house that night except the ones I brought there. As to whether I heard my little half brother testify he went to the water [fol. 96] melon patch, if he went he did not brung them there. He came to the house with me. He went with me down to the fish pond to muddy it. He did not go by himself to the water melon patch. I was gone to the water melon patch about thirty minutes. In going there, the first house I passed was the William McGowan home on the right hand side of the road the way I was going. That would be the first house you would pass in going down the road. If you were going on down the road, the next house you would pass would be Dillard King's. I don't know whether he is there any more. William McGowen's water melon patch is between his house and Peter McGowan's. To go to William McGowen's water melon patch you would turn to the right before your got to Peter's, and go into the field. There would be no reason to go down to Peter's house. As to whether I can explain to the jury why I told in this statement that when I passed down by Peg's place a grown dog had jumped on some puppies and that I heard his little girl say she was going to kill him, and her daddy laughed at her and told her to let him alone, I don't remember saying that. I will say I didn't say it, because I don't remember saying it. I did not say it. I don't know how that could have gotten in that statement. He read some of it to me. As to why I didn't tell them it was not so, if it was not, so, well, I didn't have nothing to say about it. You never said a word to me. Them Rangers were there. They were in there. Mr. Davenport and them other fellows was in there. I tell the court and the jury that somebody said something [fol. 97] to me while I was there. It was them Rangers, after you and Mr. Coker got there. That was after you all was making that statement that Mr. Ernest Coker was setting down—writing that statement. I had dropped off to sleep and one of them Rangers kicked me. As to whether Mr. Appling, the Druggist in Beaumont was in there, I

don't know him. If he was the first man on the stand here, I don't know him. He was not in there that I know of. He may have been in there but I didn't see him. He is not the man that read the statement over to me. Mr. Ernest Coker is the man that wrote it. I say that Mr. Appling did not read it to me. If he is the first man who went on the witness stand this morning, I don't know him. If he was in there I didn't see him. My answer is that I don't know whether he was in there. As to whether I saw another man there by the name of Crocker, there was so many there, I didn't know one from another. I do not remember the man who gave me the pen that I made these crosses with. As to whether I remember making them with a fountain pen, I don't remember making them at all. I did not make that cross right there. I know I never touched it. I did not make that cross. I did not touch the pen while that cross was made. I did not see those two men sign their names on that front page. I never made this cross here on the next page and I did not touch the pen when it was made. I did not see those men sign their names there. On page 3, I did not touch the cross. I did not see those gentlemen sign their names there. On page 4 I did not make that "x". I [fol. 98] did not see those gentlemen sign their names there. On page 5, I did not make that cross. I see where Mr. Appling's name is signed there. Those figures there are 8—9—5. What is that? There is a "dot" something. That typewriting there is "Bob White". That spells White.

Q. Did you read that statement in the presence of the jury?

A. No, sir.

Q. You read it then?

A. Yes, sir, I read that myself.

The Witness: I said I did not touch the pen when these crosses were made on these five pages of paper, in Beaumont down there, which is witnessed by those gentlemen whom I never seen, I say I never done that.

Q. Now, then Bob, at the time you made this statement, what time of night or day was it?

A. I didn't have no watch. I could not say. It was at night when they made that statement. Mr. Coker read it to me. Mr. Appling ain't read it to me. As to whether I heard him testify this morning that he did, here on the witness stand, I don't know whether he did or not, I don't

know. I heard somebody say, this morning, that he read it to me. He did not read that statement to me.

Q. Now will you say that that statement was not completed afer you dictated it—

A. After I dictated it?

Q. Yes.

[fol. 99] A. What do you mean by that?

Q. I mean, got through with the whole thing and quit?

A. No, sir, it was not when Mr. Coker was over there.

The Witness: As to whether I said a while ago that when I was carried over there, the handcuffs were locked on me and they phoned you to bring a key, they did not bring a key over there. They didn't have no key, over there to unlock the handcuffs. As to where I got the idea that some one phoned you to bring the key, well, you come over there—that is why. I don't know whether you brung the key or not. I think that maybe you brung the key. I would not be positive that you brought the hand-cuffs key to them or not. I got the idea that you brung it because you came over there; that's why you brung the key. I say the statement was not read over to me by Mr. Appling. It is a fact that during that period of time that we are talking about, you sent out and got coffee and I drank some. We went out and got some water. When you and I went back to get a drink of water, you did not say an unkind word to me. You never have in your life.

Q. Now then, when we came back in there, do you remember when those two strangers to everybody down there so far as Polk County was concerned—those two strangers came there—those two white men who sat in there when you was making the statement—do you remember when they came in?

A. No sir.

[fol. 100] I don't know myself what "zerned" is. I want to know. As to whether I said in this statement: "I zerned" a woman lying in the bed, I never had. If that is in this statement and somebody testified that I said it, they must be mistaken. They are bound to be mistaken. After that statement was finally fixed, I went on back in the cell. As to whether I was out in a nice little run-a-round where there were chairs and plenty of light and water and good coffee up there, I was in a run around. I was not in no cell. You and I and Mr. Coker and several others were in and out

of there for several hours. After that they put me back in jail some where.

The first part of this statement which says that I do not have to make any statement at all, was not read to me as I know of. I say it was not read to me. As to whether the statement that any statement I make may be used in evidence against me on the trial of the offense concerning which this statement is herein made" was read to me, well, there was some portion was read to me and some portion I could not understand none of it. It was not read to me. My name is Bob White. I am twenty seven years old, I reckon. I said I was going on twenty eight. I am not still twenty seven years old, I don't reckon I is. As to whether I was twenty seven when I made this statement, I never made that statement. As to whether I was twenty seven when you saw me down there in jail with Mr. Coker, well, you can count my age from 1910 and see how old I is. I lived on Mr. Cochran's farm near the Scarborough place, at that [fol. 101] time. I was staying there. As to whether I had known Mr. Ernest Cochran, Mr. Cary Cochran and Mr. Dude Cochran, all of my life, I have been knowing them practically all of my—I didn't say days. I did not say that "on the 19th day of June, I was in Houston, Harris County, Texas", because they ain't asked me. I was in Houston all right. I was there in Houston. On the 19th of June, I say I was not there in Houston. No, sir, I was not in Houston on the 19th day of June.

Q. I was working with my uncle Ed Goree; "awhile ago you said you was in the creosoting business?

A. I was working for him all right.

Q. Can you explain to the jury how that an Ranger or Mr. Coker or myself could have known where you were on the 19th of June and who you worked for, if you didn't tell us?

A. You asked me where I was at.

Q. Then if you told him that, it was put in this statement here?

A. I didn't put it in there.

Q. No, you didn't write that; nobody claims you wrote it but that is true; you was in Houston and working for Ed Goree on the 19th day of June?

A. No sir. I have worked for Uncle Ed in Houston.

Q. If you didn't tell us what is in that statement about

it, you have known it—did you ever see me in Houston in my life; did you ever see Ernest Coker in Houston?

A. No sir.

Q. Then, if you didn't tell us that, we got the informa-
[fol. 102] tion from some other source?

Mr. Johnson: H didn't say that he didn't tell you that. He said he didn't put it in the statement.

The Witness: As to whether I said "some several days after the 19th of June my brother Edgar Wright came to Houston with Buddie Harrell and Sammie Branch" you asked me how did I come from Houston, and I told you and I told you I came back with Buddie Harrell and my brother.

Q. Did you say your brother, in his car, came to Houston with Buddie Harrell?

A. Buddie Harrell and Sammie Branch. I said that. As to whether that much of that statement is true, I didn't put it in there. As to whether I told you "they came in my brother's model A Ford car, I told you they came in a car. It was a Ford car. I reckon it was a Model A. When I left Houston with them it was after dark.

Q. Now, if you said "I went back home with them, leaving Houston after dark" you must have told us that because we could not have known it?

A. I ain't never disputed—I told you, but I never did put it in that statement. I knew Mr. Jett Brooks but I did not know him mighty well. This girl Hester Profit ain't never worked for him. She never worked for him that I know of. She may have worked for him.

Q. "When we got even with Mr. Jett Brook's home there
[fol. 103] in Livington I got out of the car and went over to one of his servants house and spent the night with Hester Profit." You told me a while ago you never was there; can you explain how Mr. Coker would know that unless you told him down there?

A. I don't know what you knew, Mr. Zimmie.

Q. That is true; you don't know.

The Witness: I did not make this statement: "I stayed around Livingston several days and spent a part of each night while there in the same servant house with the same girl." I did not tell you that.

Q. If you didn't tell us that, how could we have known to put that in there?

A. That is what I want to know. It ain't like me to tell you that and I did not tell you that.

Q. Did you tell us this: "From there I went down to my mother's home on the Cochran farm"?

A. Did I tell you that?

Q. Did you tell us that?

A. I told you I went to my mother's house. I did not tell you that I assisted my mother with the crops helping them to plow and hoe, but I did help them to plow and hoe. I have not seen Mr. R. Q. Dillon here this afternoon. I did not tell you that the "next work I did I worked for Mr. R. Q. Dillon on the Garvey farm. I worked there some three or four days." I used to work for Mr. R. Q. Dillon. I worked for him after the 19th day of June and before August 10th last year—between those two times. I did not [fol. 104] tell you that "Mr. Dillon gave us a little beer party; this because we hurried up and worked his crop". He did not give us a little beer party. I am willing to say that Mr. Dillon didn't do that. I did not work for Mr. Dillon several days. I worked for him about a day and a half. As to whether it is true, that on Tuesday afternoon, August 10th, "I saw Mr. Ernest Cochran in his Ford V8 with Mr. Dude Cochran wife come by the field where I was working with other members of my family" and as to whether it is true that I saw them pass, I saw a car pass there but I don't know whose it was. I know there was a man driving. As to whether there was a lady in it, I was off at the other end of the turn row. The one furtherest from me was the man; he was going down toward the Scarborough place—or to the farm—and I was on the right hand side of the road that goes toward the Scarborough place. The steering wheel of the car would be to the left and the man was on the side with the steering gear. The reason I didn't tell you that while ago is because you didn't give me time to tell you.

Q. Yes, I gave you time; did you tell us this: "and go on down toward Mr. Dude Cochran's home" and then "Mr. Ernest Cochran came back by the field a short time after this"?

A. He went in that direction. I don't know where he was going. I did not tell you that he came back up there in a few minutes after that. If he did come back in a few minutes, I didn't see him. I told you that I worked in [fol. 105] the field until quitting time and then went to my home. I worked in the field until "quitten" time and then went to the house. I told you that in Beaumont. I told

you that "we all ate supper at my home." I told you we ate supper. "Besides my family, Aubrey Riley was there." He is kin to me. He is related to me. He and I never had any trouble in our lives. I don't reckon there is any reason why Aubrey Riley would want to tell anything except the truth about this transaction. I did not tell you that "before we left the field, Aubrey Riley gathered several ears of corn." I don't know who gathered the corn; he or my little sister. I don't know which one of them. As to whether you could have known anything about the corn—and as to whether these Rangers or Mr. Holliday or Mr. Coker—who gathered the corn if I hadn't told them about it—well, my people could have told you about the corn, afterwards. I haven't got it figured out pretty good. One of my sisters parched the corn after we got home. I don't know what it was parched in. A skillet, I reckon. I did not tell you that. I ain't told you that. As to whether I told you that "among the things we had to eat was okra" I don't remember telling you nothing about no *o*kra. We did not have some okra. As to whether I heard some of these darkies testifying that we did have, they could be wrong as well as I could. We had some gravy and flour bread. I didn't have a little fist dog. There was a dog at my mother's that night but I don't know what his name was. I did not learn the dog's name from June 19th to August 10th. The little dog was a black [fol. 106] dog. I did not tell you that "after we ate, we went out on our porch and I went in my mother's room and changed clothes. I did not go in there and change clothes. I did not tell you that I put on a pair of brown pants. As to whether I had a brown suit, I would not call them brown. The pants were kind of a dove color. There were no brown spots on the front of them. Nobody at my house wore them except me. They did not have any brown spots on them when I pulled them off. I did not have a brown or khaki colored shirt. I had a shirt like this on and a white shirt. I had a brown shirt. As to whether or not, if that is in this statement, I told you that at Beaumont, I never told you what I had. I did not tell you that I rolled up my sleeves above my elbows when you started away from there. As to whether it is a fact that in the room up stairs in the jail that night, I was requested to roll my sleeves up like I did on that night and that I rolled them up. I did not roll them up. That was not my testimony

down there in the jail at Beaumont. I did not roll them up. I did not roll them up at your request. I didn't do that. In the jail at Beaumont I did not tell you that I had on a pair of shorts. I did not have on a pair of shorts with blue stripes in them. I didn't have on shorts at all. I did not have on any undershirt in jail at Beaumont. I did not tell you that "I came back on the porch and sit there on a wooden bench for a short time and played with my little fist dog," because I ain't got no dog. I did not [fol. 107] tell you that. I did not tell you "I call him Jack." The word right there is "b-i-m." This spells "J-a-c-k." As to what that (indicating) spells, I told you I don't know, what it was. I don't know whether the little dog's name was Jack or not. I don't know his name. I did not tell you that "I then left home; this was after dark. I went bare headed and followed the main road down by all the houses between there and where I turned off to go to Mr. Dude Cochran's place." I did leave home bare headed. I did not tell you that "I had on the same shoes I now have on." I did not tell you that on the night I went down there I had on the same shoes I had on when you was talking to me at Beaumont. At Beaumont, I had on a pair of white, low-quarter shoes. I did not tell you that I bought those shoes in Houston. You ain't asked me. I don't know, sir, where I bought them shoes. It has been so long. As to whether I told you "white shoes and rather sharp toed, and are about size 10" I didn't even wear tens. I wore eights or nines. I can't wear a ten. It is too big. A ten is too large and I can't wear a ten. As to whether I told you that "the first house I passed was where William McGowen lives" I had to pass there to get to the watermelon patch. I did not tell you that. As to whether I ever mentioned to you at all at any time that I left my mother's and went to the watermelon patch or mention a watermelon patch to you at all, you ain't asked me. I didn't tell you because you didn't ask me. As to whether I ever mentioned it to anybody before I heard Mr. Rogers mention it, I have mentioned it to the Rangers. [fol. 108] They tried to make me tell I went down to Mr. Dude's house. I told them no, sir, I didn't go down there; I went to the watermelon patch. The next house after William McGowen's was Dillard King's. I don't remember telling you that at Beaumont. I did not tell you that so far as I knew, no one was awake there because

I didn't go down that far. I did not tell you that the next house I passed was Peter McGowen's. The next house I would have passed, if I had gone on, the other side of Dillard King's, would have been Peter McGowen's. I did not tell you that so far as I knew, no one was awake there. I did not tell you that "the next house I passed was the home of June McGrew; no one was awake there that I know of." As to whether old Uncle June McGrew was summoned down here by me, I saw him out there. I did not tell you that the next place I passed was Walter McDade's because I did not go that far. The next house would have been Leonard Terry, after Walter McDade's. I did not tell you that "the next place I passed was Walter McDade's, whose home was just across the road from June McGrew." His home is just across the road from June McGrew. I did not tell you that the next house I passed was Leonard Terry's. Leonard Terry's home would have been the next house on the other side of June McGrew's if I had gone down there. I did not say that "as far as I know, no one was awake there." I did not tell you that the next place I passed was Milton Thomas. I did not say: "While passing this place I heard Milton's little girl hollering at a dog that had been fighting her puppy. [fol. 109] She said to this dog, get off my puppy. I am going to kill you. I heard Milton laughing at her." That did not happen that I know of. I did not pass there that night and hear a dog jump on her puppy.

Q. Can you tell us how in the world we would have known that if you hadn't told us? Now, the Rangers could not have known that; they weren't here?

A. Well, they went to Milton and got it.

Q. Well, you heard Milton say they didn't come to him until after Mr. Coker took your statement; does it look like the Rangers would try—or know about that until after they went down there and found out about it—when they went down and got Milton?

A. I don't know what Milton would have done. I did not hear the puppy being jumped on by the old dog.

Q. Could you explain to these gentlemen why this would have been in this statement, if Mr. Holliday, the sheriff at that time, would have gone back up there and checked it and see if it did happen; can you explain why it would have been on it?

A. I don't know, sir; I know I didn't pass Milton's that

night. If I had been passing there, I would have been clear past the watermelon patch. As to whether I was a quarter of a mile or more past the watermelon patch, I don't know how far it was. It would have been a good long ways past it. I did not say "I then passed the home of Fred Johnson, and I didn't hear anybody there." I did not go down there. I did not say: "Then I passed Mr. R. Q. Dillon's [fol. 110] place." After Mr. R. Q. Dillon's home, the next place is Fred Johnson's, just before Mr. Dillon's. After Mr. Dillon's, the next place is Dave Ryan's. Dave Ryan is a witness in court here. I saw him come in here and they sent him back. They summoned him here for me. After Dave Ryan's place, the next place would have been the home of Jack Harrison. He is a colored fellow. He was here on the stand today. He is the man who said he didn't even know what kind of a short he had on. Jack and I are good friends. I did not say that "I did not hear anybody there," because I didn't pass there. I did not say the next home I passed was the home of Ed Dillon. His house is the next house on toward Mr. Dude's. As to whether I want to read that statement, well, I don't know how; I could not read it. Mr. Ed Dillon's house is the last house on the main road, before you turn off to go up to Mr. Dude Cochran's house.

(Whereupon, at 7:45 P. M. August 3, 1938, a recess was taken until 9:00 A. M. August 4, 1938.)

Morning Session

August 4th, 1938, beginning at 9:00 A. M.

Bob White (resuming): I told you last night that the last house on the main road before you turn off to go to Mr. Dude Cochran's house, was Mr. Ed Dillon's house. I did not say: "I walked up to Mr. Cochran's home and did not see his car or any car out around the house." I did not [fol. 111] make the statement: "I walked by the house, leaving the house to my left and walked on down to the little store which is behind the Cochran home proper." I know Babe Mason, a negro. As to whether Babe Mason lived in that servants house there, I don't know who lived there. I did not see Babe Mason, a negro, who, you say, lived in the place above the store. I did not say: "There

is a gate there at the back of the store, in which gate I entered." I did not say "In going by the store, I could look into Mr. Cochran's car shed and saw that his car was not there." In walking by the garage, if it was open, I reckon you could look in there. I never paid that much attention. I was not up there. I testified yesterday that the officers carried me down there when they arrested me. That was in the day time. I did not say: "I then went around behind the store and opened another gate that leads into the yard. I did not open it. I did not say: "When I entered the first gate by the store, I pulled off my shoes and left them inside by the gate. I left this gate open: also the other gate into the yard." I did not say: "Then I went to the back door, the one I took to be the door into the kitchen." I did not say: "This door was not fastened. It was a screen door and I opened it and eased inside." I did not say: "From what I saw in this room, I took it to be the kitchen. I then went into another room and passed along by what I took to be the eating table." I did not say: "Then I went into what I thought was the living room." [fol. 112] I did not say: "In this room there was some windows in front of me." I did not say: "I saw a little table there with what I thought was a lamp on it." I said that I had never been in the house before. I did not say: "In the living room, what I thought was a lamp was round and looked like a bucket."

I don't know what that is sitting on the table there (looking at a photograph shown him by Mr. Foreman). I don't know what that is. It does not resemble a bucket to me in any way. It don't look like a water bucket at the top or bottom. It ain't made like no water bucket. I don't see no handle on it. That is the only difference I see. I did not say: "There was a rug on the floor in the living room." I did not say: "From there I went upstairs." I did not say: "In going up the stairs I put my hands on the walls and I am sure the walls was papered." I did not say: "While going up the stairs I took my knife out of my pocket, which was a 'Texas Jack' ". I didn't say that. I did not say "it being the knife that the officers took off of me when I was arrested and which knife Mr. Holliday has now." I did not say: "When I got up into the room the bed was kindly to my right, with windows, or at least a window towards the main road down toward the Scarborough house." I did not say: "This being the road I

followed until I turned off to Mr. Dude Cochran's place." I did not say: "There was another window to my left, this being the window that the woman tried to jump through." [fol. 113] As to whether that is a window with a screen over it, torn loose, well, it (looking at photograph shown witness) looks like a screen, Mr. Zimmie.

Q. Is that the window Mrs. Cochran tried to jump out of when you was up there?

A. I don't know sir, I was not up there. I did not make the statement: "When I first got into the room I zerned a woman lying in the bed." I did not make that statement.

Q. Will you spell that word there for me, that is underlined there?

A. Right here?

Q. That is right?

A. What is that? "S"?

Q. I asked you to spell it, I can spell.

A. S-e-r-n-e-d.

Q. Now, what does that spell?

A. I don't know sir. I did not make the statement that I "zerned a woman lying in the bed."

Q. Did Mr. Coker or some one up there just put that in there without you telling him?

A. He must have; I didn't tell him.

I did not say: "I walked up to the right side of the bed." I did not say that "The woman jumped out of the bed on the other side from where I was and run to the window from the foot of the bed, or the window to my left as I entered [fol. 114] the room." I don't know whether she did that or not. I was not there. I did not say: "She struck the window with some part of her body and just at that time I grabbed her with both of my hands under her arms from the back and pulled her back." I did not say that. I did not do that. I did not say: "At this time I had the Texas jack knife open in my hand." I did not say: "she grabbed me by the arm and I jerked the knife through her hand." I did not say: "the first thing I remember being said by either one of us, she spoke and asked who is you." I did not say "who is you." I did not say: "I did not, at that time, say anything." I did not say "I am a little too fast; the first thing that was actually said, the woman screamed when she hit the window." I heard Mrs. Cochran say and testify yesterday she screamed

when she hit the window. I did not say to Mr. Coker: "then after she had asked who is it, she said don't you know them Cochrans will kill you." I did not say that, because I was not there that night. He must have just put it in there. I did not then say "I don't care." I did not say "then I threw her down there on the floor." I did not make the statement "when she wheeled and jumped off the bed I heard a object hit the floor that sounded to me like iron of some kind." I did not say: "as I said, when I threw her down, I then closed my knife up and put it in my pocket." I did not make the statement "when I had her down on the floor her feet was closer to the door that I had entered." As to whether I heard Mrs. Cochran testify [fol. 115] that her feet was closer to the door than her head, I did not understand what she said. I did not say: "She had on what I would call a gown." I did not say "I then unbuttoned my pants and actually had the woman." I reckon that underlined word spells "had." I don't know, sir, whether it does or not. I did not make the statement that "during the entire time that I was actually having intercourse with her she lay there on the floor with her arms stretched by her side as if she had fainted or was dead." I did not make that statement to Mr. Coker. I did not make the statement that "when I got through with her I left her gown up and started to leave. I got to the door and decided for sure she was dead. I then went back to put my hand around on her body. This to see if she was breathing." I did not make that statement. I did not make the statement that "I run from there down the road by the side of the house to about the mail box where I sat down and put my shoes on and tied them." I heard Mr. Holliday testify about tracking barefooted tracks to the mailbox and shoe tracks the rest of the distance. That is what he said. I did not make the statement that "I went back to my home and went to bed on a wire cot that is there now." As to whether I did go back home and go to bed on a wire cot, I was already at home. I said I went to the watermelon patch. I went to bed on a wire cot after I got back from the watermelon patch. I did not make the statement that "I had gotten home and gone to bed and I recognized Mr. Carey Cochran's car and one of the [fol. 116] sheriff's cars pass there." I did not make the statement that "I told my mother right there and then that there goes Mrs. Caries and Mr. Holliday's cars and

when Mr. Carey comes back I am going to stop him and tell him about the cotton." I did not make that statement. Mr. Coker or somebody else must have just put that in there. I did not make the statement that "my mother said, well see him then, because I do not want to pay Williams boy $1.20 a bale for hauling my cotton." I did not say: "Immediately after this I went right on to sleep." I did not make the statement that "and did not wake up any more until daylight." I did not make the statement that the "next morning I awoke and went on to the field to work and this is where the officers arrested me the following morning, about nine or ten o'clock." The officers did not arrest me the following morning about nine or ten o'clock. I was arrested, but the officers did not arrest me. I considered Mr. Ernest Cochran arrested me.

As to whether, on one occasion several months before that night this thing happened, I went down to Mr. Cochran's store and bought a bucket of lard, I never been to the house. I never been to the store house. I did not make the statement that "before this time when I went down there and raped this woman I had been to the little store in the back of the yard since Mr. Dude and this lady had married, one time. I went over there to buy some lard for my mama. I walked up there near the house and called [fol. 117] Mr. Dude. This same lady, Mrs. Cochran, came to the back door and answered me and asked me what I wanted." I did not make that statement.

Q. Did you make this statement: "I told her I wanted some lard and she sent her oldest little boy Joe — you testified you knew Joe and Laddie?

A. No, sir, I don't know her children. I did not make the statement that she sent her oldest little boy Joe, out there to wait on me. When Mr. Coker——

Q. Did you make this statement: "He came out with a key and unlocked the store and we went in. When we got in the store, there was a piece of paper on the counter with some writing on it. I picked up the paper and tore it some. The little boy Joe said to me, don't do that; don't tear the paper, saying it might be some business or something"; did that happen?

A. I don't know sir, I was not there.

Q. I mean ever?

A. I ain't never been there.

Q. Did you tell Mr. Coker that when he took the statement?

A. No, sir. He must have put that in there without me saying it. I did not make the statement that "I knew both of the little boys; one of them was named Joe and the other Laddie." I did not make the statement that "I knew Mrs. Cochran. I had seen her a number of times," "riding around there and a number of times with Mr. Dude." I [fol. 118] seen Mrs. Cochran before but I did not know her personally. I have seen her pass the house. I have seen her riding with Mr. Dude. She was with him. I did not tell you all that "I left my trousers, the brown ones, and the brown shirt that I wore that night in my mama's room at her house." I don't know what room I left them in but it was at the house. I did not make the statement that "when I left the house running down the road, I was running on my toes more than any other part of my foot." I did not make the statement that "I was bare footed, without socks and the woman was barefooted and had on nothing but a gown." This part of the statement was not read over to me: "I have had this statement of some five pages read over to me and fully explained by a man who I am told is Mr. H. R. Appling who says he is in the drug business here in Beaumont, Texas. This statement is entirely true and correct as I remember it." That was not read over to me. I still say that neither you nor Mr. Coker, said an unkind word to me.

I testified in this same case at Livingston, in Polk County, Texas, at the special August term; in 1937, before Judge Browder, Mr. Rogers and Mr. Roland questioned me and somebody on the State's side questioned me.

Q. There was a Court Reporter, Mr. Joe Hess, taking down your testimony just like Mr. Graham is now?

A. I don't know what he was doing. I testified yesterday that I was in the Beaumont jail and that the Rangers kicked me and woke me up.

[fol. 119] Q. I will ask you if you made this statement under oath in Judge Browder's court in Polk County in this same case: "The reason I signed the statement, was because the Rangers told me to do it"?

A. I told you all yesterday that the Rangers told me if I didn't sign that statement that they would kill me. I don't remember saying that in Judge Browder's court. I say I don't remember saying it. I did not testify or make

the statement that "the Rangers were not present at the time but they came over there later." They were there with me.

Q. Well, did you make the statement in Judge Browder's court, that Mr. Joe Hess took down that "The Rangers were not present at the time, but they came over there later"?

A. No, sir, I don't remember making that statement.

Q. Will you say you didn't make it?

A. I don't remember making it.

I say now that I had never been to the Cochran home or store before; that I had never been there.

Q. I want to ask you if you didn't, in open court, with Judge Browder as Judge, and with Mr. Joe Hess as Court Reporter, over in Livingston, at a former trial, if you didn't make this statement: "I went to Mr. Cochrans and bought some lard in 1936"? and wasn't that in answer to your own lawyer's questions—Mr. Roland?

A. Well, if I said that I don't remember it:

[fol. 120] Q. Well, did you say it?

A. I say I don't remember. I did not go there and buy some lard. I ain't never been there to buy some lard.

I testified yesterday that I did not put the pen—make the "X" on that paper at all. As to whether I made the statement up in Judge Browder's court when I was being tried, that "I will tell you the truth about it as well as I know—I made this little "x" on this statement", and as to whether I made that statement in Judge Browder's court in Polk County, well, if I made it, Mr. Zimmie, I don't remember it. I will tell you the truth. I did not make the "X" mark on that paper. I do not remember that I further said that I was touching the pen. I did not testify that I touched the pen. I did not testify over there that "I touched the pen on page one; I touched the pen on page 2; I touched the pen on page 3; I touched the pen on page 4; I touched the pen on page five; I made that little "x" mark." I did not say that in open court.

Q. Now, you testified yesterday that you did not remember seeing Mr. W. R. Appling, the first witness that took the stand; you testified you didn't remember seeing him in Beaumont?

A. I told you I didn't know him. I do not remember seeing the first man who testified yesterday, in Beaumont. That is what I testified yesterday. I did not make this statement at Livingston: "I remember seeing Mr. Appling, the

man who testified here today that he was in Beaumont and that he read the statement over to me. I remember seeing [fol. 121] him in Beaumont. He never said a cross word to me." I did not make that statement when I was on trial before. I said he did not read it to me. I testified yesterday that Mr. Appling did not read it over to me. As to which is right; what I testified to at Livingston or here, I said he did not read it over to me. I did not make this statement; "Mr. Coker told me that I didn't have to make any statement at all." Mr. Coker did not tell me or warn me that I did not have to make any statement at all; that any statement I did make could be used in evidence against me."

Q. When you swore it up at Livingston, was it true or untrue?

A. I ain't swore it.

Q. All right; you say you didn't swear to it; did Mr. Coker tell you—Mr. Coker told you that any statement you did make could be used in evidence against you; Mr. Coker wrote the statement down; is that true?

A. Not as I knows of Mr. Zimmie.

Q. Did you make this statement: "On Tuesday, August 10th, the day Mrs. Cochran was assaulted, I saw Mrs. Cochran and I saw Mr. Ernest Cochran". Did you make that statement in Livingston, in open court.

A. Yes, sir, I saw Mr. Ernest pass there. As to whether I saw Mr. Dude Cochran, there was a woman in the car. I don't know whether it was her or who.

I testified here yesterday, that I didn't even know my [fol. 122] dog's name. I did not make the statement that "I came back on the porch and sit there on a wooden bench for a short time and played with my little fist dog. I call him Jack", that I know of. That is not true: I don't know his name. I did not make the statement that "I ain't never been in Mr. Cochran's house but twice." When I was being tried at Livingston, I did not make that statement. That is "I", I reckon. What does a-i-n't" spell? that is what the letters are. It does not say "never". As to whether I made the statement at Livingston that "I ain't never been to Mr. Cochran's house but twice" I ain't never been there. I did not make that statement, when I was on trial at Livingston. I did not make the statement at Livingston that "On Tuesday night, I remember Mr. Carey Cochran and Mr. Holliday coming by there". If I said at Livingston that "I

told my mother I was going to stop Mr. Carey or had a good mind to stop him when he came back by the house and talk to him about the cotton" I don't remember it. If I made that statement in open court I don't remember it. My mother did not say anything to me about stopping Mr. Cochran and talking to him about the cotton that I know of. I did not see him pass there that night that I knows of. I did not make the statement in open court—not at Beaumont—that "I told my mother I was going to stop Mr. Carey or had a good mind to stop him when he came back about something, if I was awake". I did not tell my mother I was going to stop him when he came back, about [fol. 123] something if I was awake.

I testified yesterday that I just lay down on the iron cot in the front porch and the skeeters got so bad, I went inside. If I testified before that "I had an iron cot at my house" I don't remember it. There was an iron cot there but it was not mine. It was sitting on the front porch. I did not make the statement that "that cot is what I slept on that night." I did not make the statement that "I slept out on the porch that night" because I didn't sleep on the porch that night. I did not make the statement that I slept on the iron cot that night. I did not make the statement that "nobody slept on the iron cot with me". I did not make that statement in open court when I was being tried, just like I am now. When I was being tried, I did not make the statement that "I sleep out on the porch on the iron cot by myself." I did not make the statement that "my sister and her husband slept in the other room." I did not make the statement that "my mother slept in the west room, or the room facing the road toward Mr. Dude's place, and Aubrey Riley slept on the floor in that same room." When I was being tried before and the court reporter was taking it down just like this gentleman is here, I did not say that "I went into the store and bought an eight pound package of lard." I have never been there. I did not make that statement, I did not, in connection with that statement, say that "I had some money but I forget just how much it was; two or three dollars." I did not make the statement when I was [fol. 124] being tried before that "I picked up a piece of paper and tore it and the little boy told me not to tear it; that it might be some business." I did not testify in court that "I picked up a piece of paper and tore it and the little

boy told me not to tear it; that it might be some business." I did not make that statement in open court when I was being tried. I did not make the further statement that "the Rangers didn't tell me to put that in the statement." I know what you are talking about when you say "Rangers." I did not testify in open court that "Nobody in the world told me to put that in there about Joe and Laddie." I ain't told them that. I did not make the statement in open court that "nobody in the world told me that was done there last fall; that is, that I bought an eight pound package of lard and started to tear up a piece of paper. I told about that lard myself." I did not make that statement in open court when I was being tried before.

Q. Now then, you heard your lawyers ask Mr. Holliday yesterday, if he didn't take a list of those houses going down there; you heard him ask that and Mr. Holliday told him no?

A. If he did, I didn't understand what they were talking about. When I was being tried before, I did not make the statement that "I was asked to name those houses, and I did name them. I named them freely and voluntarily. Nobody forced me or compelled me to name them. I told whatever I told there, freely and voluntarily." I did not testify that in open court when I was being tried before. [fol. 125] When I was being tried before, I did not make the statement that "I stayed at home the remainder of the night of August 10, 1937. That is the night that I slept on the gallery." When I was tried before, I did not say that "The Rangers did not make me say what I said in this statement; Mr. Ernest Coker did not make me say what I said in that statement." Mr. Ernest Coker ain't make me say nothing. I did not say that: "Mr. Foreman did not make me say what I said in this statement." You never did ask me about anything in the statement that was not true. You never did ask me. I did not make the statement, when I was being tried at Livingston that "Mr. Appling did not make me say what I said in this statement," because I didn't say it, because I don't know Mr. Appling. I did not say that "Mr. Crooker did not make me say what I said in this statement." I do not remember Mr. Crooker being up in the Beaumont jail. I did not say when I was being tried at Livingston that "nobody made me say what I said in this statement."

Re-direct examination.

By Mr. Rogers:

I did not tell Mr. Coker what to write in that statement at Beaumont. I was in fear of my life or serious bodily injury. I had recently been injured, at Beaumont. I was in fear of my life or serious bodily injury when the case was tried before.

Witness excused.

Defendant rests.

[fol. 126] Z. L. (Zimmie) Foreman, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pitts.

My name is Z. L. Foreman. I live at Livingston, Texas. I have lived in the County forty-two years; that is all of my life. I have been in Livingston all together about thirty years. Fox Campbell and I are law partners. He has lived at Livingston all of his life. I know W. S. Cochran. I am acquainted with Carey Cochran, his brother, and with Ernest Cochran. I have known Ernest Cochran all of his life. I have known "Dude" for about thirty years. I have known Carey, I would say, practically the same; that is, about thirty years; twenty five or thirty years. Ernest Cochran is an Attorney at Law. He is Judge Manry's law partner. Judge Manry and Ernest Cochran are law partners at this time. Before Ernest became connected with Judge Manry, he was a member of the firm composed of himself, Judge Murphy and Fox Campbell. Judge Manry also lives at Livingston. I was not holding any office in August, 1937. Prior to the last few years, I was County Attorney over there for a while. I know R. D. Holliday and have known him for as much as twenty years. In August, 1937, he held the position as Sheriff of Polk County, Texas. He resigned from that position, I think it was along about the first of September. That would not miss it two weeks—in 1937. I have known the defendant [fol. 127] Bob White for several years. I don't know just

how long; just seeing him. I would say I have known him four or five years. I am sure I have seen him before that. But I have known him to know who he was and talked to him for the last several years. I was in Beaumont at the time this purported statement was taken. I went down there with Mr. Ernest Cochran, County Attorney. As to what time, about, we got to Beaumont, I would have to guess at that. I think it was around two o'clock at night; maybe three o'clock; somewhere around two o'clock at night. No one else went with us. After we reached Beaumont, we went up stairs, oh, I don't know, five or six stories I think up in the jail building. I saw Mr. R. D. Holliday up there and I saw Mr. Roy Young and I saw Mr. James or Jameson, whichever his name is—a Ranger and I saw Mr. Appling and Mr. Crocker, and others, around there. If you ask me about them I can tell you better. Bob White was there when I got there. He made a statement to Mr. Coker, there. I was present. Those present there when he made that statement, were H. R. Appling and Herman Crocker. There were others came in—just walked in and out. As to whether any of these Rangers I named, were present at the time he made this statement, I believe they did walk in occasionally and walk out. We were upstairs there. The elevator was locked and the negro was out in the run-a-round there in the room and the place back where there is a bath; there was several rooms that connect that they could go into. I had never seen Mr. Appling and Mr. Crocker, that I know [fol. 128] of. I know I had never met them. Both Mr. Appling and Mr. Crocker reached the place where Mr. Coker and I were, before he made the statement. After we reached the place, I could not go into detail and tell everything that was done. I know that Mr. Coker gave him warning. All I know of the statement, of my own knowledge, I heard him read it over to him, and explain it to him. At that time, none of the Rangers kicked the defendant. Nor did any one else kick him. Nobody did anything to him except to treat him just as nice as they could. We had asked Bob, if there was any thing wrong in the statement to correct it, and right on down the line like you and I are sitting here, talking to you. Mr. Ernest Cochran used the typewriter. He was County Attorney of Polk County? I don't know who dictated that statement. I don't think it was dictated. Bob White told what hap-

pened and Mr. Ernest Coker, here, put it down. At that time, I did not dictate that statement that has been offered in evidence here.

I was present at the time the case was tried at Livingston. I helped try it. At that time, the defendant, Bob White took the witness stand. I was present in court. I cross-examined the defendant, Bob White, on that trial. Upon the occasion of that trial, the defendant, Bob White, after being sworn as a witness, testified in response to a question propounded to him by his counsel, Mr. Roland, that "The Rangers were not present at the time; but they came over there later."

On the occasion of that trial, in response to a question [fol. 129] propounded by Mr. Roland, the defendant Bob White testified that "I went to Mr. Cochran's and bought some lard in 1936."

On that occasion, at that trial, the defendant, while testifying as a witness to questions propounded by me, testified as follows: "I will tell you the truth about it as well as I know. I made this little X mark on the statement. I was touching the pen. I touched the pen on page one. I touched the pen on page two. I touched the pen on page three. I touched the pen on page four. I touched the pen on page five. I made that little X mark."

On that occasion on that same trial, the defendant Bob White, while testifying as a witness in his behalf, in response to a question propounded by me, testified: "I remember seing Mr. Appling, the man who testified here today; that he was in Beaumont and that he read the statement over to me. I remember seeing him in Beaumont. He never said a cross word to me."

Upon the occasion of that trial in Livingston, while he was testifying as a witness, Bob White, in response to a question propounded by me, made this anwser: "After I had made this statement, Mr. Appling, the man who was on the witness stand, took his time and read it over carefully and slowly to me."

The defendant, on that trial at Livingston, testified to the following testimony: "Mr. Coker told me that I did not have to make any statement at all. Mr. Coker told [fol. 130] me that any statement I did make could be used in evidence against me. Mr. Coker wrote the statement down." He said that.

The defendant Bob White, on the occasion of the trial in Livingston, while testifying as a witness in his own behalf, in response to questions propounded by me, stated: "On Tuesday, August 10th, the day Mrs. Cochran was assaulted, I saw Mrs. Cochran and I saw Mr. Ernest Cochran. I saw Mr. Ernest Cochran when he passed the field." He told us that.

On the occasion of that same trial, the defendant, while testifying in his own behalf, in response to a question propounded by me, made this statement: "On Tuesday night I remember Mr. Carey Cochran and Mr. Holliday coming by there. My mother wanted to stop Mr. Carey when he came back by the house and talk to him about the cotton. I did see Mr. Carey Cochran pass there."

On the occasion of that trial, the defendant, while testifying in his own behalf in response to a question propounded by me, made this statement: "I told my mother I was going to stop Mr. Carey or had a good mind to stop him when he came back something about, if I was awake."

The defendant, while testifying in the trial of this case at Livingston, in response to a question propounded by me testified that "I had an iron cot at my house. That cot is what I slept on that night. I slept out on the porch that night. I slept on the iron cot that night."

[fol. 131] The defendant also testified on that occasion in response to a question propounded by me that "My mother slept in the west room or the room facing the road toward Mr. Dude's place, and Aubrey Riley slept on the floor in that same room."

On the occasion of that trial, the defendant, while testifying in his own behalf in response to a question propounded by me, testified that "I went to the store and bought an eight pound package of lard."

He also testified, in response to questions propounded by me that "I picked up a piece of paper and tore it and the little boy told me not to tear it; that it might be some business."

On the occasion of my visit to Beaumont at the time he made the statement there, if he made the same statements to Mr. Coker that are written down there in the Beaumont statement.

The defendant, while testifying as a witness in his own behalf on the occasion of the trial at Livingston, in response to a question propounded by me, made a statement to this

effect: "I was asked to name those houses; and I did name them. I named them freely and voluntarily. Nobody forced me or compelled me to name them. I told whatever I told there, freely and voluntarily." He testified to that.

On the occasion of that trial in Livingston, the defendant Bob White, while testifying in his own behalf in response to a question propounded by me testified: "The Rangers did not make me say what I said in this statement. Mr. [fol. 132] Coker did not make me say what I said in this statement. Mr. Foreman did not make me say what I said in this statement. Mr. Appling did not make me say what I said in this statement. Mr. Crocker did not make me say what I said in this statement. Nobody made me say what I said in this statement." That was at the Livingston trial.

Cross-examination.

By Mr. Johnson.

I have lived in Polk County all of my life but I have lived in Livingston about thirty years. As to whether I am throughly familiar with the road-way all the way from Livingston to the river, I have been over it several times. I had never been in the Cochran home before August 10th, 1937. I know I went down there on the 11th. I was in there last week. And I might have been in there one other time after the 10th of August. I know I was down there on the 11th and I know I went down there again and I believe I did go in the house then after the 10th of August, 1937; and I was there last week. I did not go down there to make an examination of the house. I really went down there just as a matter of curiosity, like everybody else does. I am sure I went in the downstairs part of the house. I don't think I went upstairs. The first time I was in there I did not notice the arrangement of the furniture. I was there in daylight. I know Sheriff Holliday was there at one time I was there but I didn't go down there with him, I don't think. That was prior to the date of the confession in Beaumont. I went to Bob White's house on the afternoon of August 11th, 1937. I was there at the time the [fol. 133] brown pants and shirt were obtained. In fact, Mr. Carey Cochran and myself got the clothes. As to whether it is a fact that I immediately became vitally interested in the facts in connection with this case, I don't

know just exactly what you mean by that. I will say that I became interested. I will say that. As to whether the Rangers were in and out at least, in the room where Bob White was at the time this statement was being made at Beaumont, I will say that there were some Rangers up there who came in. If Bob White stated that Rangers were there at the time of making this statement, as to whether he was correct, part of the time, I will say that there was a Ranger in there and out of there. It is not a fact that there was some officer or officers there all the time, guarding Bob. I know that Bob and I went off in another room and got some water, by ourselves. I am sure that Mr. Davenport was upstairs and I am sure that Mr. Williams or Williamson was. I don't know for sure. I just know I was in there some time; just in and out and just walking around. As to whether I learned that the Rangers knew that Mr. Coker was coming there for the purpose of taking a statement, I am sure they did know it. I know that Mr. Holliday knew it and I am reasonably sure in my own mind the Rangers knew it. I know Mr. Holliday knew it. I would not know where they took Bob from to take him to Beaumont. I do not and would not know what time Bob arrived in Beaumont. As to whether I know that Bob was up and awake at two o'clock in the morning, I will say I will say that Mr. Coker and I left Livingston around [fol. 134] twelve o'clock. As to whether it required from about two o'clock in the morning until after daylight to type this statement, only as I told you while ago; we fooled around there and Bob and I went off in a room and I went out and got some coffee a time or two. They were really waiting to go up and get somebody down there that was not involved in it and that knew nothing about it to witness the statement. As to whether we kept him there from at least two o'clock in the morning until daylight, I sat up with him. I do not know how long Bob had been up.

On the trial there at Livingston, Bob testified as to being whipped. He did not exhibit scars there, that I saw, on his back or arm or back and arm. He did not exhibit any scars on his back. I am not sure he testified at that trial that he told Mr. Coker that he went down to the water melon parch and got those water melons. If it is in the statement I will say that he did. Yesterday when I made the statement here before the jury that the water melon patch testimony did not appear until Mr. Rogers got into

the case, I think that would certainly be correct, because Rogers was in the case when the testimony was taken down. I don't think I asked him, when I was examining him as to whether or not he testified before about the water melon patch. He testified on that trial that "the Rangers told me that everybody in the bottom laid it on me; and that I might as well own up to it; and that if I didn't own up to it they would kill me." I believe he testified that the Rangers told him to own up to it; that [fol. 135] if he didn't own up to it they would kill him.

I talked to Bob one time, after this offense, prior to the time I visited him in Beaumont. That was down at the home of Mr. Ernest Cochran, when the officers had him here. I interrogated him at that time. I talked with him. As to whether I asked him questions about the matter, if you will come up here, I will tell you what happened (witness and defense counsel hold conversation before court in tones not audible to the reporter or the jury). That is all. That is the only thing I had to do with it. There was about fifteen negroes down there and I think he was kept down there about an hour; that would be close to it; about an hour or an hour and a quarter; that would not miss it fifteen minutes. This was in Livingston at Ernest Cochran's home. The Rangers came in and out at Beaumont as I said. I know the Rangers were there when I got there I mean to say that the language in this statement is in the vocabulary of Bob White as near as we could get it? I think it is in his words as near as we could get it; absolutely, just near as I can remember it. I think it is. I can qualify that. I know that they are underlined in some places I don't know the man's name who took him out of our presence at Beaumont but I believe the jailor carried him off, maybe upstairs and locked him up. I am sure some of the Rangers were upstairs but I don't believe they went up with Bob at that time. He testified at Livingston that "I have some signs on my arms yet from that whipping." I believe he testified "I will pull up my [fol. 136] sleeves and show you." * * *

Redirect examination.

By Mr. Pitts:

On the occasion that the defendant was in Beaumont and made the statement there I certainly did not make any

suggestion to him as to what transpired down there at the Cochran home at the time that the alleged assault took place. As to whether I made any suggestion to him with reference to the location of the houses or the location of the farms, I didn't even know them myself. Of course I saw one or two of them but I could not tell you. Ernest Coker, the County Attorney did not make any such statements. I know he didn't. He didn't know either. The rangers or others had not made any such statements to him in our presence. The statement was absolutely made in my presence from the beginning to the end. At the time he was there, he rolled up his sleeves just as high as he could, at my request. I was as close to him as I am to Mr. Graham (The Reporter); you might say closer. That is about three feet. I did not discover any scars or bruises or abrasions on his arm anywhere. If there were any there, I did not see them. I never heard of it until the other trial. I saw his arm, as high as he could roll his sleeves. At that time he made no complaint with reference to it.

Witness excused.

[fol. 137] HERMAN CROCKER, a witness called by the State, being first duly sworn, testified as follows:

Direct examination:

By Mr. McClain:

My name is Herman Crocker. I live at Beaumont. I have lived at Beaumont five years this past 12th of March. I am agent or salesman for the Beaumont Motor Company. I have never served as a Peace Officer. I carried a commission as a peace officer on account of the place there. On August 18th, 1937, I had an occasion to see the defendant, Bob White. I saw him on the 8th floor in the County jail in Beaumont, Jefferson County. I met Mr. Ernest Coker, County Attorney of Polk County, up there that day. That is the first time I had ever seen him. I did not know any member of the Cochran family at that time. I saw the Jailor and the Sheriff there, that I had known prior to that time. I recall a statement that was made by Bob White on that occasion. The statement which you now show me is

the statement made by Bob White at that time (being the statement which the State had offered in evidence). The names of H. R. Appling and Herman Crocker appear on each page of that statement as witnesses. That is my signature. I know who wrote that statement out. The County Attorney of Polk County, wrote that statement out. That is the gentleman sitting back there. After the statement had been reduced to writing Bob White held this fountain pen here, the top of it like that while the County Attorney [fol. 138] signed it and made his mark. This is the same fountain pen. Before Bob White signed this statement that I have in my hand, it was read over to him two different times, very close and carefully all the way through and was asked "is that right, Bob" all the way through. Mr. H. R. Appling, the other witness to the statement, read it to him.

Q. Before the statement was made and before it was signed state whether or not any one gave him—gave any kind of warning to the defendant?

A. No, sir, I didn't hear any given and I was there.

Q. I see you don't understand; was there any kind of warning given to the defendant that he did not have to make a statement or any——

A. Yes, sir. He was asked if he wanted to make a statement and he said yes and he broke down and commenced crying; tears were running out of his eyes and he was asked if he felt better since he had broke down and he was asked if he had made up his mind to make a confession and he said yes and they went on then and started—the County Attorney started typing this then. This is the statement he made. Mr. Coker wrote it down as he said it. He was asked very carefully and ever- word repeated as high as three times, on each one.

Cross-examination.

By Mr. Johnson:

There were no Rangers there at the time; when this statement was being made. In fact, I didn't see any at any time. I don't know how long I was there, but I imagine an hour or [fol. 139] two hours. I am not sure of the time. He had not been questioned any when I was there excepting when Mr. Foreman had a conversation with him. Mr. Foreman says "Bob do you want to give us a confession" and he said yes,

each time. He asked him three or four times before they ever started typing. Mr. Foreman asked him if he felt better now, since he had decided to give a confession. He did not begin telling this purported statement with the tears running down his cheeks. It was not running down his cheeks all the time. Just once or twice; just when he started out and then he looked like he felt better. I would not say he was sufficiently excited that he was crying about it. In my judgment, in some cases, one who cries, they are calm. This is one of the exceptions.

Cross-examination.

By Mr. Rogers:

I testified in this case at the former trial. I testified then that "the negro just couldn't word it. If he put down some words the way the negro worded it, it would have been right backward all the way through; just like most negroes talk." That is in there. I said he repeated it three times and he was particular in trying to put it down.

Witness excused.

[fol. 140] M. W. Williamson, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pitts:

My name is M. W. Williamson. I live at Houston. I am a State Ranger. I have been in that service since 1935. I have been to Polk County. I was there in August, 1937. I went there on orders from Captain Purvis to assist the sheriff's department in an investigation of the assault on Mrs. Cochran. I got there on Wednesday afternoon, which was, I think, on the 11th. I said my purpose in being there was to investigate the assault on Mrs. Cochran. I never at any time struck or beat or whipped the defendant, Bob White. I did not, at any time, on the occasion of my investigation of the offense, ever handcuff him around any tree and whip him. He was never whipped or beaten or mistreated at any time in my presence. I did not carry him to

Beaumont. Sheriff Holliday carried him to Beaumont, but I do not know who else was with him. I saw the defendant after he reached Beaumont. Ranger Davenport went to Beaumont with me. After I reached Beaumont, I went to the jail. At the time I was there in the jail, I saw Mr. Coker and Mr. Foreman. I saw the defendant. At that time the defendant discussed with we officers and Mr. Foreman, the circumstances under which the offense was committed. At that time, Mr. Davenport was present. We were both in and [fol. 141] out. We didn't stay in there all the time. Just in and out. After they got ready to reduce this instrument to writing, I was not present. I was never there after Mr. Appling and Mr. Crocker got there. I had gone then. As to how long I had been there with Mr. Coker and Mr. Foreman, before Mr. Crocket and Mr. Appling got there, I don't know when they came up there. I had been up there. On the occasion that statement was made, neither me nor Mr. Davenport kicked the defendant. No one else there kicked him, while I was there. No one ever kicked him while I was present.

Cross-examination.

By Mr. Johnson:

I was not there when Mr. Crocker, one of the witnesses was there. I didn't go in and out at all while he was there. I do not know whether any of the other Rangers were in and out during that time or not. So far as I know, no rangers were present when the statement was being made. If there is testimony here to the effect that me and Mr. Davenport were going in and out while the statement was being made, that is incorrect. I testified on the trial at Livingston, that "I don't know exactly the number of times that I took this negro out from the jail during the time he was confined in jail, because I took him out so many times." I further testified at Livingston that "I would take them out on the road. I would drive out off of the road with them." It is my testimony now that no one, at any time, in my presence, ever handcuffed Bob to a tree or whipped [fol. 142] him. I did not threaten at any time as to what was going to happen to him if he didn't sign the statement. I didn't do that. I did not know of that ever having been done.

Re-direct examination.

By Mr. Pitts:

We took him out of jail to talk to him. The jail was crowded. There was lots of them in there and we took them out where we would be by ourselves to talk to him.

When I left Beaumont, on the occasion that statement was made, I think it was around 3:30; between three and three thirty—something like that.

Re-cross examination.

By Mr. Johnson:

That was in the morning. We left Beaumont around 3:30 in the morning. I did not take Bob White with me. I did not take Bob White to Beaumont. I do not know how much of the night Bob White had been up, prior to the time I was in Beaumont. I didn't see him that night until we got to Beaumont. When I was in Beaumont, those with me of the Ranger force were: Mr. Davenport, and Ranger Mack—believe were there; no, it was Ranger Mace. I am not positive they were there. I don't know what color shirt Bob had on at Beaumont at the time. I don't remember.

Witness excused.

[fol. 143] E. M. Davenport, a witness called by the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pitts:

I am a State Ranger. I have served as a Ranger about three and a half years, this last time. I know Mrs. Ruby Cochran, Mr. Dude Cochran's wife. I first became acquainted with her along in August of last year. I was sent to Livingston by Captain H. B. Purvis. I stayed out there about six or seven—maybe eight days. At the time I was there I had occasion to see and talk to Bob White, the defendant. As to whether me, or any one else in my presence ever beat or whipped him or handcuffed him to a tree or kicked him, there never was anybody kicked him or whipped him either. I did not see anybody handcuff him

to a tree and beat him. I was in Beaumont, but not when this statement was made. I got down there, oh, I imagine about maybe twelve o'clock; between eleven and twelve. Mr. Holliday was there when I got there. The defendant was already there. I saw Mr. Foreman and Mr. Coker there that night. There were in a room talking to this nigger. Mr. Williamson and I were there too, part of the time, in and out. I would say I was there an hour or an hour and a half, or something like that, when Mr. Coker and Mr. Foreman were talking to the negro. I was not there when Mr. Appling and Mr. Crocker were there. I was not there when they came down there. I was not there when the defendant's statement was reduced to writ-
[fol. 144] ing. I was present about an hour or an hour and a half while they were talking. On the occasion of the former trial of this case, I was at Livingston. At that time, the defendant, Bob White did not point me out as one who had beat and whipped him, or as one who threatened to kill him if he testified a certain way. Of course I never threatened to kill him. Neither one of us Rangers kicked him during the time Mr. Foreman and Mr. Coker were talking to him; absolutely not?

Cross-examination.

By Mr. Johnson.

I stated that I arrived in Beaumont about eleven or twelve o'clock. As to whether I would say it was more or less than ten o'clock, I would not say what time it was. It was approximately eleven o'clock. I found the defendant up and awake and dressed at that time, in the jail. As to whether he was in the custody of Mr. Holliday, I guess he was in custody of the Beaumont jailor. He was upstairs in the jail when I went up there. I left Beaumont, I imagine about three or three-thirty o'clock and he was still up then. I have no idea when he was released from the men who were there interrogating him. If he was kept until after daylight he would have been up from at least eleven o'clock at night until daylight, but I don't know how long he was kept there. If he had been kept for a week longer, he would have been there a week longer.

Q. And if he had been taken out four or five nights by Williamson from the County jail at Livingston, he would [fol. 145] have been up those nights?

A. I don't think that happened. I would not say he was not taken out of the jail at Livingston and taken out on the road and taken out in the woods. It would be hard to say. I don't believe it because I was up there. If Mr. Williamson testified to that, I could not say he was wrong. I said I didn't believe he was carried out four or five times from the jail. I don't know what Mr. Williamson testified to.

Witness excused.

COLEMAN WEEKS, a witness called by the state, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mc Clain.

My name is Coleman Weeks. I live at Livingston. I have lived at Livingston fifteen years. I was a peace office during 1937. I know the defendant in this case, Bob White. I had an occasion to see Bob White during August of 1937. That was after he was arrested for the rape of Mrs. Ruby Cochran.

Q. Mr. Weeks, you recall yesterday, the defendant pointed you out as one who mistreated him while he was in jail: I will ask you to state to the jury whether or not at any time, you whipped, beat or mistreated the defendant in any way?

A. No, sir, I never have. No one, in my presence, whipped or mistreated the defendant in any way. I have no knowl-[fol. 146] edge of any one whipping or mistreating the defendant during the time he was under arrest.

Cross-examination.

By Mr. Johnson.

The defendant was taken out of jail while I was there. I don't know how many times. I accompanied the Rangers when they took him out. I don't know whether I accompanied them on every occasion. I do not know what might have occurred while I was not present. I do not know whether the Rangers took him out of jail when I was not with them or not. If they took him out when I was not there, I don't know how many times it was done.

Witness excused.

STIPULATION

(Not in the hearing of the jury.)

It is agreed by counsel for the defense that all of the witnesses named in the application for a continuance appeared in court upon the first and second days of the trial of this cause.

All Parties Close

[fol. 147] REPORTER'S CERTIFICATE

I, W. H. Graham, acting official Reporter for the Ninth Judicial District of Texas, of which Montgomery County is a part, do hereby certify that the above and foregoing 156 pages contain a full, true and correct transcript of all of the evidence admitted by the court, reduced to narrative form, upon the trial of the case of The State of Texas vs. Bob White, No. 8208 in the District Court of Montgomery County, Texas, tried before Hon. W. B. Browder, Judge presiding, which trial began on August 2, 1938, and was concluded on August 4th, 1938, so far as testimony was concerned.

I further certify that as to certain portions of the testimony, as shown in this record, it was, in my opinion, necessary for me to use questions and answers in the following cases, among others:

(1) Where the answer of a witness was not responsive to the question propounded.

(2) Where the question was duplicitous or confusing, and the answer of the witness was responsive to one portion of the question, and not responsive to the other portion of the question.

(3) Where only a portion of a question was answered and it was difficult to determine which portion of the question the answer was meant to be a reply.

(4) Where there was doubt in my mind as to whether the question and answer, if narrated, would state the facts as [fol. 148] intended to be stated by the witness.

(5) Where a question stated a fact that was an issue between the State and the defendant, and the reply of the

witness was evidently meant to answer that part which asked for facts and not intended as an admission of the fact stated in the question; in other words where the question itself included unsworn testimony of the attorney asking the question.

(6) In all cases where an interpretation by the Reporter of a question and answer might be wrong and the meaning was doubtful in the mind of the Reporter.

Witness my hand at Conroe, Texas, this September 8th, 1938.

Signed (W. H. Graham), Acting Reporter, as aforesaid.

[fol. 149] AGREEMENT OF COUNSEL

It is agreed by and between the Attorneys for both the State and the defendant in the above entitled and numbered cause, that the above and foregoing pages 1 to 156 both inclusive, contain a full, true and correct statement of all the testimony admitted in evidence by the court upon the trial of said cause, and that this record shall be filed as the statement of facts in said cause.

Signed (W. C. McClain), District Attorney, 9th Judicial District of Texas.

Signed (J. P. Rogers), (Wm. Jay Johnson), (S. F. Hill), Attorneys for the defendant.

[fol. 150] JUDGE'S APPROVAL

The foregoing record having been presented to me for approval; and it appearing that the Acting Official Reporter has duly certified to its correctness; and it further appearing to the court that Counsel for both the State and the defendant have approved it as being a correct statement of all the facts admitted in evidence by the court upon the trial of said cause, said record is here now approved and ordered filed as the statement of facts in the above entitled and numbered cause.

And it appearing from the Certificate of the Reporter that in certain cases it was, in his opinion, necessary to put certain of the proceedings in question and answer form

for the reasons stated in his certificate on pages 157 and 158, supra, and the court having considered such fact, it is the opinion of the court and it is so ordered that said testimony, whereever it is in question and answer form, remain in that form in order that a correct interpretation of the meaning of such proceedings may be had, for the reasons stated in the Reporter's certificate.

Witness my signature at Conroe, Texas, on this the 28th day of September, 1938.

(Signed) W. B. Browder, Judge Presiding.

[fol. 151] CLERK'S OFFICE, COURT OF CRIMINAL APPEALS

at Austin, Texas

CLERK'S CERTIFICATE

I, Olin W. Finger, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that the foregoing one hundred and fifty (150) pages contain a true and correct copy of the statement of facts in the case of Bob White vs. State of Texas, No. 20188 in the Court of Criminal Appeals of Texas.

Witness my hand and seal of said Court, this March 11, 1940.

Olin W. Finger, Clerk. (Seal of Court of Criminal Appeals of Texas.)

[fol. 1] Indictment Omitted. Printed side page 1 ante.

[fols. 2-13] Defendant's First Applications to Quash the Special Venire and Indictment Omitted. Printed side pages 3-8 ante.

[fol. 14] State's Answer Omitted. Printed side page 15 ante.

[fols. 15-18] Charge of the Court Omitted. Printed side page 16 ante.

[fol. 19] Verdict and Judgment Omitted. Printed side page 20 ante.

[fol. 20-37] First Amended Motion for New Trial Omitted. Printed side page 21 ante.

[fol. 38] State's Answer to Defendant's Motion for New Trial Omitted. Printed side page 39 ante.

[fol. 39] Order Overruling Motion for New Trial Omitted. Printed side page 40 ante.

[fols. 40-41] Bill of Exception No. 1 Omitted. Printed side page 43 ante.

[fols. 42-43] Bill of Exception No. 2 Omitted. Printed side page 45 ante.

[fol. 44] In Court of Criminal Appeals of Texas

No. 20188

Bob White, Appellant

v.

The State of Texas, Appellee.

Appeal from Montgomery County

Opinion—Filed March 22, 1939

Appellant is a negro; he was charged with rape by violence and was awarded the death penalty. He was tried heretofore in Polk County, and received the death penalty on his former trial, which will be found reported in 117 S. W. (2d) 450.

Upon appellant's application this cause was transferred on a change of venue to Montgomery County, which is in the same judicial district as Polk County.

Appellant filed a motion to quash the indictment in this cause in the district court of Montgomery County,—after the same had been moved thereto, and at the time same was called for trial,—on the ground that he, being a person of the African race, had been discriminated against because of his color, in that no person of African descent was drawn or served on the grand jury that found the indictment against him, and that his constitutional rights under the United States Constitution had been infringed upon and

denied to him. When his motion was called to the attention of the trial court he qualified bill of exceptions No. 2 relative thereto as follows:

"That after said motion was filed the State filed its answer thereto, setting up that his motion was not timely in that it had not been presented before a change of venue was had from Polk County to Montgomery County, Texas. Notwithstanding that said motion to quash the indictment had not been presented before a change of venue was had from Polk County to Montgomery County, after said motion had been filed and the State had duly filed its answer, the court asked the defendant if he had any proof to offer in support of his motion, to which inquiry no answer was given, and neither was there any proof offered in support of said motion; after which the court in all things overruled said motion to quash the indictment."

In the first place such motion came too late; it should [fol. 45] have been filed and disposed of prior to the filing of the motion for a change of venue by appellant and the granting of the same in Polk County. Art. 564, C. C. P. provides:

"An application for a change of venue may be heard and determined before either party had announced ready for trial; but, in all cases before a change of venue is ordered, all motions to set aside the indictment, and all special pleas and exceptions which are to be determined by the judge, and which have been filed, shall be disposed of by the court, and, if overruled, the plea of not guilty entered."

That this article contemplates the hearing of a motion to quash the indictment because of the exclusion of members of the negro race prior to a change of venue, we have heretofore held in the Shipman case, 98 Texas Crim. Rep. 533, 265 S. W. Rep. 570, as follows:

"By the terms of Article 630 C. C. P. (now 564) it is provided that in all cases before a change of venue is ordered, all motions to set aside the indictment, and all special pleas and exceptions which are to be determined by the judge, and which have been filed, shall be disposed of by the court. It is said in a number of cases decided

by this court that this article contemplates that all questions relating to the form of the indictment must be raised and disposed of before a change of venue, and that nothing should remain thereafter but the trial of the general issue. Loggins v. State, 8 Texas Crim. App. 434; Ex parte Cox, 12 Texas Crim. App. 665; Barr v. State, 16 Texas Crim. App. 333; Fitzgerald v. State, 87 Texas Crim. Rep. 34; Scitern v. State, 87 Texas Crim. Rep. 112; Finch v. State, 232 S. W. Rep. 528."

Again we quote:

"This article requires that all matters which do not affect the substance of the change must be disposed of before the defendant applies for change of venue." Vance v. State, 34 Texas Crim. Rep. 395, 30 S. W. Rep. 792, and cases there cited; Goode v. State, 57 Texas Crim. Rep. 220, 123 S. W. Rep. 597; Note 4, p. 490, Vernon's Ann. C. C. P., Vol. 1.

This article providing that before ordering change of venue judge shall decide motions to set aside indictment, contemplates that any attack on the indictment shall be in [fol. 46] county where it was returned. See Parr v. State, 1 S. W. (2d) 892, 108 Texas Crim. Rep. 551.

It will be noted that when appellant offered his motion to quash the indictment in Montgomery County, that no testimony of any kind was offered by him to sustain the allegations in the motion, and it seems that the State was correct in its replication to such motion, in that it moved to strike the motion because the same was filed too late, and in the improper court, and we think the court was correct in overruling such motion. It seems, however, that this motion was again brought before the trial court in appellant's motion for a new trial, and much testimony was heard thereon, and again we think the careful trial judge was justified in his ruling thereon. In the statement of facts shown at the hearing of the motion for a new trial, the jury commissioners who drew the grand jury list for the term at which appellant was indicted, testified that they selected the list of grand jurors because they knew them to be good men, without regard to color or race; that they did not take into consideration the color or race of any individual; they only tried to get good men, and men qualified to serve on the grand jury, representative

citizens of the county. They took the names from the tax rolls, and had no thought regarding their color; they did not intentionally leave off any person because of race or color. There were no negroes selected on the grand jury however, and that they never considered that from a position of color; they never thought of it. It is our opinion that when appellant finally made his attempt to show discrimination against him in the selection of the grand jury that indicted him, it was shown to the contrary, that is, that no such intentional discrimination was had or shown. We fail to perceive any error shown in this bill No. 2.

Bill of exceptions No. 1 relates to an effort upon appellant's part to quash the special venire of 100 men ordered by the court from which to select the jury which finally tried this appellant,—on account of the fact that no negro was presented on said jury venire as a possible juror, thereby evidencing a discrimination against appellant because of his color and race. There was no testimony offered relative to this matter at the time the motion was presented, [fol. 47] and the testimony relative thereto also only appears in the statement of facts heard on the motion for a new trial. It appears therefrom that the jury was selected from a list that had been previously selected by jury commissioners, and was drawn in the proper way by the proper officers. That there was no negro on the jury venire, but there was a negro on the grand jury in that county at that time. There was no testimony of any kind tending to show that negroes had been discriminated against in the selection of the special venire presented in this case, although no negro was present on this venire, and we think the court was correct in his overruling this motion to quash.

Bill of exceptions No. 3 complains of the introduction of an alleged confession by the defendant, because the same was claimed to have been extorted from him by means of a whipping and violence shown to him, and under duress and threats, thus rendering the same involuntary; and also that the same was finally made to certain persons who were highly prejudiced towards the appellant; that same was made under promises to appellant, and was not his confession but was dictated by one of the prosecuting officers, and many other objections were made thereto as set forth in thirteen separate and distinct paragraphs in the bill. The court in an exhaustive charge thereon submitted to

the jury practically the whole burden of appellant's objections to this confession, and in every instance instructed the jury to not consider the confession for any purpose unless they believed beyond a reasonable doubt that same was made under a proper warning, freely and voluntarily, and not under any fear, duress or coercion, fraud, persuasion, promise of immunity, or any other improper influence. In fact the court surely went as far, if not farther, in his charge relative to such confession as the rights of the appellant required him to go. In any event we see no error reflected in such bill.

We do not think it necessary to review bill of exceptions No. 4, but have considered the same, and it is overruled.

Bill of exceptions No. 5 does not show what numerous questions were asked appellant relative to his testimony at a previous trial, and is so incomplete and vague that [fol. 48] we cannot tell what is finally complained of, and in such a condition the same is overruled.

Bill of exceptions No. 6 complains of the action of the trial court in withdrawing from the jury appellant's answer to a leading question. Under the court's qualification thereto, we see no error therein. If appellant desired the answer to his question. The same could have readily been framed in an unobjectionable manner, and doubtless the jury could have received the same under sanction of the court. This same ruling also applies to bill of exceptions No. 7.

Bill of exceptions No. 8 complains of the remarks of the private prosecutor, Z. L. Foreman, wherein he is alleged to have said:

"It doesn't make any difference to Mr. Johnson and Mr. Rogers (appellant's attorneys) what happened to Mrs. Cochran, (the injured lady). As far as they are concerned, their innocent negro should be turned loose."

It is shown by this bill that immediately upon objection being made thereto, the court instructed the jury to disregard such remarks. It is also shown by the bill that appellant objected to all of such remarks and preserved his bill. A portion of these remarks were surely not objectionable, and we do not think that, if objectionable, they were of such a material nature as that they could have unfavorably influenced the jury, especially in the light of the court's instruction relative thereto.

Bill of exceptions No. 9 complains of the following remarks of Mr. Foreman in his argument to the jury:

"The facts in this case show that Bob White went right up into that room that is there in this statement, when you gentlemen take it and look at it,—and I don't believe Ernest Coker would have thought of it; I don't believe Appling would have thought of it; I don't believe Herman Crocker would have thought of it; I know I would not have thought of it; Bob White says this: 'When I first got into the room I 'Zerned' a woman lying in the bed.' Why, do you imagine, that he 'zerned' a woman lying on the bed, I don't know whether he could say that in the army or not; I don't know whether he could say that in the American Legion or not. I would be ashamed to tell any jury, with the moon shining and a woman laying there like she said, with her head about [fol. 49] a foot from the window—I would be ashamed to say—and the man came to that door there, that he could not see a woman on the bed in this moon shine. I would honestly be ashamed. Bob White said 'zerned' a woman laying on the bed. Gentleman of the Jury, you believe that Johnson——."

These remarks were objected to as being out of the record, at which time the court admonished counsel to stay within the record. A reading of the statement of appellant as well as the facts in the case convince us that these remarks were a fairly deducible argument from the facts proven.

Bill of exceptions No. 10 complains of the argument of Mr. Foreman wherein he passed certain complimentary remarks relative to Mr. Holliday, the sheriff of Polk County, at the time of the commission of this alleged offense. While these remarks concerning his ability as an officer were surely gratifying to Mr. Holliday, we do not think they injuriously affected this appellant's cause before the jury. We also note that the trial court, at appellant's request, instructed the jury to disregard such remarks.

Bill of exceptions No. 11 is so incomplete that we would not consider the same except for the fact of the gravity of the verdict herein. We do gather therefrom that a doctor was placed upon the stand by the State who testified that he took some fluid from the private parts of the injured lady herein about two hours after the time she was alleged to have been raped, and that such fluid contained active, live sperm, less than six hours old, such as would be contained in semen from a male person. The main objection thereto being that it was impossible to tell from whom the semen

came, whether a white or black person, such testimony being entirely speculative, and taken at too great a time removed from the alleged hour of the crime committed on this lady. The doctor also testified as to the lady's highly nervous condition, and that these germs were very active when examined by him under a microscope; that their activity would last only about six hours. We think that the objection to the testimony would apply to its weight rather than to its admissibility, and see no error herein.

Appellant complains in his brief of the fact that while [fol. 50] the Ninth Judicial District Court was sitting at Conroe, in Montgomery County, at a regular term thereof, the district judge of said Ninth District convened a special term in Polk County, one of the counties of this district, and impaneled the grand jury that indicted this appellant, thus having two courts sitting in the same district, although in different counties, at the same time. He contends that an order should be shown in this record adjourning or recessing the regular court at Conroe before it would be legal to convene a special term in Polk County, and that therefore the indictment found against him in Polk County at such special term was without warrant of law and void. That there can be two terms of the same district court at the same time in different counties of the district is a well recognized legal doctrine. We quote from 11 Tex. Jur., p. 816:

"* * * Similarly a judge may hold a regular term in one county of his district, and during such regular term go to another county in his district and hold a special term, going backward and forward to make orders and transact the business of the courts," citing Wilson v. State, 87 Texas Crim. Rep. 538, 223 S. W. Rep. 217.

We quote from the Wilson case, supra:

"The Elliot case, 58 Tex. Cr. R. 200, 125 S. W. 568, seems in point. It appears in that case that, while the court was in session in Anderson County, the judge went to Houston county, another county in his district, and there convened court, and organized a grand jury, which proceeded to function. He then returned to Anderson county, where he was holding court. This court upheld the action of the trial court in such procedure, and refused to hold invalid an indictment returned by the grand jury impaneled and authorized to act at said special term."

This matter has been gone into rather fully by Judge Hawkins in the opinion on motion for a rehearing in the late case of Crausby v. State, 26 S. W. (2d) 246, and he has reviewed therein the authorities that uphold the action of the trial court in this cause. Therein is found a quotation from McIntosh v. State, 53 Texas Crim. Rep. 137, as follows:

"He was the district judge and the law empowered him to convene a special term of the district court, and for that purpose he might, if he saw proper, adjourn another court at a different place in his district, or suspend the [fol. 51] session of said court in such other county, or recess the court in order to hold a special term, if public necessity and the public good required it."

The facts in this case show that Mrs. Ruby Cochran was the wife of W. S. Cochran, and that she was the mother of two little boys, one eleven and the other thirteen years old; that her husband was a farmer, and also had a store on his farm near his home. That on the night of the day charged in the indictment Mr. Cochran was absent from his home, and his wife was there alone, save for her two little boys. That after she had gotten the little boys to sleep downstairs she retired to a large room upstairs, and prepared for bed, removing all her clothing and placing a nightgown on her body. That she had a pistol that she oftentimes took to bed with her when alone. That early in the night she heard some peculiar noises in the house which aroused her, but to which she paid no further attention other than to take her pistol in her hand and listen. Again she heard a noise, and something caused her bed to shake. Her bed was near a window, with the shade up, and after she felt her bed shake she said "Joe, is that you?" Her little boys had sometimes been in the habit of coming in to their mother's room when they awakened at night, and when she made this remark she thought it might have been her son Joe who had shaken her bed. Immediately some one leaped upon her on the bed and she began to struggle with him. She then jumped off the bed, screaming, and ran to the window and attempted to leap through it, and struck her head thereon, but on account of such window being screened, she was unable to get through before the intruder grabbed her and pulled her back. She continued struggling with him, and grasped one of his hands and found an open knife therein, which was pulled through her hand, cutting it. She

then attempted to reason with this person, and told him "Don't you know what the Cochrans will do to you," and he replied, with an oath "I don't care what they do to me; I don't care what happens to me." After having become exhausted in her struggle, the intruder threw her to the floor and ravished her, threatening to kill her, and holding his knife on her. This man satisfied his lust upon her [fol. 52] body; she being in such a helpless condition, that after leaving her body on the floor and starting out of the room, he returned and placed his hand on her, and then immediately left. As soon as she had recovered Mrs. Cochran gave the alarm to the neighbors, and her husband's brothers immediately, and she was taken into town to a hospital. Barefooted tracks were found near the house, and appellant in his confession corroborates the story of Mrs. Cochran in most of the details. He gave a description of the interior of the house, from its entry until he left the same; he tells of his progress through this house which he had never before entered, giving many details that could only have been known by observation; he tells of this conversation relative to what the Cochrans would do to him, as well as what he did to Mrs. Cochran at the scene. He also told of the incident of the knife, and her attempts to get away by leaping through the upstairs window; how he dragged her back, and of hearing something fall on the floor when she lost her pistol; he also told of returning and feeling her body to see whether she was dead, and then he described his barefooted flight from the house. He also told of an incident that happened on his trip to the house relative to passing a neighbor's home and hearing a little girl complaining to her father because of the fact that a big dog had bitten the little girl's puppy, which incident found confirmation in the statement of both the little girl and her father, and which could only have been known to him by his having heard it, thus showing his proximity to the Cochran home on the night in question. His confession contained so many corroborative statements of Mrs. Cochran's testimony that it is abundantly convincing that he was bound to have been present at the commission of the assault. Mrs. Cochran did not identify the appellant; there was no light burning in her home at the time the crime was committed, but she does say that her assailant was barefooted; that he had a very offensive breath, and was undoubtedly a negro.

The district judge gave a comprehensive charge on the

law of the case, and in an excess of caution embodied therein a charge on circumstantial evidence, and we think that he [fol. 53] has accorded the appellant every right that he was entitled to under our laws and Constitution. We think that the facts unerringly point to the appellant as the assailant of this lady, and that they exclude every other reasonable hypothesis than his guilt. We think that under the facts the jury was justified in the assessment of the extreme penalty, and so believing this judgment is affirmed.

Graves, Judge.

(Delivered March 22, 1939)

[File endorsement omitted.]

In Court of Criminal Appeals of Texas

No. 20188

Bob White, Appellant,

v.

The State of Texas, Appellee.

Appeal from Montgomery County.

Affirmed. Opinion Judge Graves.

Judgment

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is ordered, adjudged and decreed by the court that the judgment be in all things affirmed, and that this decision be certified below for observance.

[fol. 54] In Court of Criminal Appeals of Texas

[Title omitted]

Opinion on Appellant's Motion for Rehearing—Filed May 17, 1939

In the motion for rehearing appellant insists that we were in error in the original opinion in making the following statement: "Immediately someone leaped upon her on the bed and she began to struggle with him. She then jumped off the bed, screamed, and ran to the window and

attempted to leap through it." Referring to page 71 of the statement of facts, we find in the testimony of the prosecutrix the following statement: "There was a struggle and I jumped off on my right and screamed and ran and tried to get away and so I just saw the outline of the window and then I tried to get through the window."

Appellant reiterates his contention that the jury commission discriminated against negroes in the selection of the grand jury. We quote from the court's qualification appended to bill of exception No. 2, as follows: "The defendant filed his motion to quash the indictment for the reason that there were no negroes among the jury commission who selected the grand jury which indicted the defendant, and for the reason that there were no negroes upon the grand jury which indicted the defendant, and that there were no negroes drawn on same, and for the reason that negroes were purposely left off of the jury commission and grand jury. That after said motion was filed the state filed its answer thereto, setting up that his motion was not timely in that it had not been presented before a change of venue was had from Polk County to Montgomery County, Texas. Notwithstanding that said motion to quash the indictment had not been presented before a change of venue was had from Polk County to Montgomery County, after said motion had been filed and the state had duly filed its answer, the court asked the defendant if he had any proof to offer in support of his motion, to which in- [fol. 55] quiry no answer was given, and neither was there any proof offered in support of said motion; after which the court in all things overruled said motion to quash the indictment." It appears that proof was offered in support of the motion on the hearing of the motion for new trial. This was too late. We quote from Langrum v. State, 79 S. W. (2d) 850, as follows: "Appellant challenges the sufficiency of the indictment upon the ground that it was obnoxious to the Fourteenth Amendment to the Federal Constitution, in that there was race discrimination against appellant in the selection and action of the grand jury which found the indictment against him. The contention is untenable, for the reason that it was waived by the appellant. The waiver consisted in his pleading to the indictment and proceeding to trial without raising the question upon which he now relies. From the record it definitely appears that appellant made no complaint upon

the ground mentioned during his trial, but after conviction he, for the first time, in his motion for new trial presented the plea to which reference is made. The controlling precedents are collated in the case of Jaurez v. State, 102 Tex. Cr. R. 297 (see page 301), 277 S. W. 1091. The qualification appended to the bill of exception shows that before appellant pleaded to the indictment the court asked appellant if he had any proof to offer in support of his motion. Appellant gave no answer but proceeded to trial. Having waived his right, he was in no position to assert in his motion for new trial that race discrimination had been practiced in the selection of the grand jury.

A careful re-examination of the record in the light of appellant's motion for rehearing leaves us of opinion that the proper disposition was made of the appeal in the original opinion.

The motion for rehearing is overruled.

Christian, Judge.

(Delivered May 17, 1939.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

[fol. 56] [File endorsement omitted.]

[fol. 57] IN DISTRICT COURT OF MONTGOMERY COUNTY FOR THE NINTH JUDICIAL DISTRICT OF TEXAS

No. 8208

THE STATE OF TEXAS

vs.

BOB WHITE

STATEMENT OF PROCEEDINGS ON MOTION FOR NEW TRIAL—Filed September 28, 1938

August 26th, 1938.

Hon. W. B. Browder, Judge Presiding.

Appearing for the State:

W. C. McClain, District Attorney, R. L. Pitts, Fox Campbell, Z. L. (Zimmie) Forman.

Appearing for the defendant:

J. P. Rogers, W. J. Johnson, S. F. Hill.

W. H. FREEMAN, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is W. H. Freeman. I am a resident of Polk County. I have lived there all of my life. I am thoroughly acquainted throughout the County. I am fifty six years old. [fol. 58] I was not one of the Jury Commissioners that selected the grand jury that indicted Bob White for an assault or rape on Mrs. Ruby Cochran. I think I was on the jury commission that selected the jury to try this case. We selected the venire, the special venire. I don't remember whether I was drawn as a jury Commissioner to select the grand jury or not, but I was, to select the venire. In connection with our selection of the special venire, as a jury commissioner for that purpose, we used the tax rolls from which to select the venire. I can say that I was familiar with the tax rolls.

Mr. McClain: I will just say this: I believe you did select, as you recall, the jury commission at a special term of court and the jury commission selected the grand jury that returned the indictment, as well as the venire. I am sure that is correct, if you will recall.

The Witness: I say, I forget whether it was or not. It may have been, but I do not recall that.

Mr. Johnson: Then, I will ask you the question and the District Attorney here has agreed to stipulate that the witness' memory is short with reference to stating that he was not a member of the jury commision that selected the grand jury and it is agreed that he was a member of that commission.

Mr. McClain: I feel reasonably sure he was. I don't know. I would not agree; but if he served on one, he selected the grand jury, as well as the venire.

The Witness: In selecting the special venire there, I [fol. 59] was acquainted with the various men who were selected; that is, I knew who they were, when they were selected.

Something has been said or called to my memory as to whether or not I served as a jury commissioner for the section of the grand jury that returned this indictment

against Bob White. I believe it was. I believe we selected the grand jury. I think we did. I may have, as I have testified, as one of the Jury Commissioners, selected the special venire from which the trial jury was selected. I believe we did. The other Commissioners who served with me were: Kirby Walker, also known as J. M. Walker, of Moscow and Mr. L. D. Galloway, of Goodrich. Mr. Galloway is a merchant at Goodrich. As a member of that jury commission I did not select any negroes as members of the grand jury to try the charge against Bob White returned by indictment, if they found one. Not that I remember of; but we taken the men as we came to them and tried to get as good men as we could, to serve in this case. I know that there are negroes in that County who were freeholders and householders. Quite a number of them. I am familiar enough with the facts to state that some of the negroes paid their poll taxes. They can pay the poll tax and not the property tax but they cannot pay their property tax without paying their poll tax. As to whether it was my intention as a jury commissioner, at any time, to select negroes on the grand jury, we did not discuss the negroes to serve on the grand jury and neither did we [fol. 60] discuss negroes to serve as veniremen. We taken men that we thought were qualified to serve on the grand jury and the venire in the case. We selected Mr. H. H. Galloway, who is a white man; Mr. S. J. Cannon, who is a white man; and Mr. J. I. Oliver, who is a white man; and Mr. J. T. Bradford, who was a white man. He is dead now. We selected Mr. M. J. Taylor, who was a white man and Mr. C. C. Pool, who was a white man; and Anson Thomas who was a white man; and Mr. Bob Smith who was a white man; and Ottis Parrish, who was a white man; and Mr. Chester Redd who was a white man; and Mr. E. L. Hinson who was a white man and Mr. H. A. Wilson, who was a white man. At that time they all resided in Polk County. I know that Mr. L. D. Galloway and Mr. Walker resided in Polk County. These names that you read off to me, beginning with Mr. H. H. Galloway and ending with Mr. H. A. Wilson constituted the grand jury that returned the grand jury, against Bob White. So far as I know, that is the indictment under which he was tried.

I can point out to you, which of those grand jurors who are in attendance here. You say that the list which you

now show me is the grand jury list, that was furnished by the Clerk of the court. Mr. Galloway over there was on the jury commission, H. H. Galloway is absent. I don't see him. S. J. Cannon is right over there (pointing). J. I. Oliver is right over there. Mr. Bradford lived at Goodrich. He is dead. Mr. M. J. Taylor is right over there. C. C. [fol. 61] Pool is absent. Mr. Anson Thomas is sitting over there. Mr. Bob Smith sits over there. And Mr. Ottis Parrish over there. E. L. Hinson is absent. Mr. Redd is right over there. I also see Mr. J. M. Walker, a jury commissioner.

Cross-examination.

By Mr. Pitts:

I testified a while ago I was raised over in Polk County, at Leggett. That is eight miles north of Livingston. These men whom I have identified as grand jurors, I know practically all of them personally. I knew them personally at that time. Those men who served as grand jurors in that case, were men that had lived in the County over a long period of years. They were men with good reputation in the communities where they lived. They lived at different places throughout the County. All of them were good citizens and good men. When I qualified as a jury commissioner and received the charge of the court he instructed us to get good men to serve on the grand jury and also as veniremen. In carrying out that instruction of the court with reference to selecting grand jurors and selecting the veniremen which we did select, we selected them without regard to color.

Q. You did not take into consideration the color of an individual; you got men you knew to be good men?

A. Yes, sir. That was the only thing we did in making the selection of grand jurors. The only reason we had in selecting these particular men out of the great group of [fol 62] white voters as well as colored people up there, was that the men selected should be good men and qualified men to serve on the grand jury. They were representative citizens throughout different sections of the County.

Witness excused.

L. D. G. Galloway, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is L. D. Galloway. I live at Goodrich in Polk County. I have lived there about sixty-seven years; all of my life. I was one of the jury commissioners which selected the grand jury to pass upon the charge against Bob White when Bob White was charged with the crime of committing rape upon Mrs. Cochran. I recall Mr. Freeman who has just testified. He helped select the grand jury. In making our selection, we did not select any negroes on that grand jury. I had no thought of selecting negroes for service on that grand jury. I can't remember about how often I have served as a jury commissioner in that County; not exactly, I have, several times.

In selecting that grand jury, we just taken men we knew and thought was qualified. We was supposed to comply with instructions. We examined the tax rolls. I am not thoroughly acquainted all over the County. I know people. I am well acquainted throughout my section, at least. [fol. 63] There are a great number of negro home owners—land owners and freeholders in my section. I heard the questions you propounded to Mr. Freeman, and his answers. Mr. Freeman, Mr. Walker, and I, being the jury commissioners, did select the grand jury that indicated Bob White and the special venire from which the trial jury was selected.

Cross-examination.

By Mr. Pitts:

Goodrich is eight miles south of Livingston. Mr. Walker was also on the jury commission with me, and Mr. Freeman who lives at Moscow, which is sixteen miles north of Livingston. I lived then at Goodrich. Mr. Walker lived at Moscow and Mr. Freeman at Leggett. In the selection of this grand jury, as a jury commissioner, we selected men whom we knew to be good men. The men whom we selected lived in different parts of Polk County, throughout different sections of the County. In making the selection of those grand jurors we did not intentionally leave

off any race or any color. We selected those grand jurors because we knew them to be good men, without regard to color. When the court charged us as jury commissioners, he instructed us to select good men and we carried out that instruction. I said we did that without regard to color or race, or any of those things.

Redirect examination.

By Mr. Johnson:

It would be my testimony that there are some negroes in the County who are pretty good negroes. As to why we [fol. 64] left the negroes off of the list at all, they was not considered at all. Never though- anything about it.

Witness excused.

AGREEMENT AS TO CERTAIN TESTIMONY

Mr. Johnson: Now, would you agree that Mr. Walker's testimony would be about the same—in the interest of saving time?

Mr. McClain: Yes, I agree to that.

Mr. Johnson: It is agreed that each grand juror in attendance here would testify, if placed upon the stand, at this hearing, that there were no negroe members of the grand jury which indicted Bob White in Polk County, Texas, on the 23rd day of August, 1937, charging that Bob White, on or about the 10th day of August, 1937, committed an assault by force, threats and fraud, without the consent of Mrs. Ruby Cochran, by ravishing and having carnal knowledge of the said Mrs. Ruby Cochran.

Mr. Mc Clain: We have agreed that those grand jurors who are now present, who are here at this time, would testify that there were no negroes on the grand jury that returned the indictment in this case.

LESTER MC GUIRE, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

[fol. 65] My name is Lester McGuire. I live at Conroe in Montgomery County, Texas, I have resided here thirty-

nine years. At this time I am District Clerk of the District Court of Montgomery County, Texas. That happens to be the Ninth Judicial District and the Special Ninth Judicial District. On or about the 30th day of July, 1938, at 11 o'clock A. M. I was that clerk. I prepared and had issued, this special venire list in the Bob White case, No. 8208 on this docket. I issued that on the indictment against Bob White, found in Polk County and transferred here on a motion for change of venue. The number of this case on the docket of the District Court of Polk County, Texas, before it was transferred here, looks like No. 7188. The number here is 8208.

I am fairly well acquainted over the County here. I was a candidate for public office and canvassed the County in the Campaign for election.

I know Mr. J. Ross Brogdon. He is white race. I know Mr. J. H. Rose, of Conroe. He was a white man. He was excused as a special venireman. I know Mr. E. I. Hoke, of Richards. I know a whole bunch of Hoke's, but I believe I am personally acquainted with this one. All those are white people. I do not know of any negroes named Hoke. I know Mr. Lonnie Stowe of Conroe. He is a white man. J. R. Orton of New Caney, is my hunting partner. We hunt deer and squirrel. H. B. Parrish of Fostoria is a white man. Virgil Gilliland of Conroe, is a white boy. Mr. Mose Davis, of Willis is a white man. Henry C. Strickland of [fol. 66] Splendora is a white man. J. N. Heaton of Pinehurst is a white man. I don't remember Van Lawrence, of Conroe. I don't know him. W. D. Brantigan, of Pinehurst, is a white man. G. A. (Guy) Evans is a white man. He was marked "absent" at first, and later "present." Joseph Foster, at Richards, is a white man. W. U. Harper, Route 1, Conroe, is a white man. J. E. Hardy, of Willis, is a white man. I don't know Mr. Doug Merren, of Willis. I don't know C. F. Young, of Conroe. H. L. Nochols, of Magnolia, is a white man. J. R. Johnson Sr., of Montgomery, is a white man. B. W. Williams of Richards is a white man. M. I. Hale of Security is a white man. C. W. Grissom, of Richards, is a white man. J. Parker Perry, of Conroe, is a white man. He plays base ball. He is marked "excused". E. V. Triplett of Conroe is a white boy. E. H. Hohn, New Caney, I don't know him. C. J. Nevill, of Willis, is a white man. He appears to have been excused. C. E. Johnson is a white man. E. W. Chambers, a ball player,

is a white man. He appears to have been excused. Mr. Luther Hall of Willis, is a white man. Julius H. Kidd, of New Caney, is a white man. He was "absent" at first, and later answered "present". I don't know John Wiggins. All the Wiggins I know are white, and I know several. E. P. Jones, of Richards is a white man. Milton Myers of Willis, is a white man. J. D. Kelley is a white man. L. M. Holmes of Montgomery is a white man.

On that entire list, there may be the name of a person [fol. 67] on there of the African race, but if there is I don't know who it is. I was present when the special venire was examined. There was first, a general examination and then they were placed individually upon the stand. As to whether I saw any member of the African race who was a member of that special venire at that time, I don't remember about this case. I saw a negro here on a panel one time but I don't remember which one it was. In the light of my testimony with reference to those who were absent or excused here on this list, with the exception of three I said I did not know, they are all white men; those that are known to me. I do not know of my own knowledge whether there — any householders or freeholders among the African race in Montgomery County, except one we have on the grand jury now. He testified he was a householder and a freeholder. I know there are a good many negroes living in the County but I don't know if their homes belong to them. They are maintaining households. There are some, what you call good negroes in this County. Bob White, this defendant on trial in this case, is a negro or a member of the African race.

Cross-examination.

By Mr. McClain:

I do not know all of those who are listed on the special venire in this case, that were summoned. There were a number who did not appear. I do not know whether any of those summoned were of the African race or not. In drawing the venire, I drew them as per instructions given me, without regard to race or color. At the time I drew [fol. 68] the special venire I did not know whether I was drawing white men or negroes. I do not know whether there were any negroes drawn on the special venire or not because there were some on the special venire that I

did not know. As to how I went about to select the venire in this case, I took the jury list for the whole term, and there were thirty-two men for each of the six weeks and I wrote each of their names on a separate piece of paper and put them in a shoe box and shuffled them all up and my Deputy would reach in the box and draw out one name at the time and call it out to me and I would write it down on the special venire list. There were six weeks, and thirty-two names for each week, which would be about 192 names all together. Out of those 192 I don't know whether it is a fact that there were no negroes selected for the Bob White special venire, because there were some of them that I didn't know. I think that all of the men who answered present here were white men, when I called the roll, and they answered, but I don't know. Those that are marked "a" here on this list, were absent. That "a" is in my handwriting. In those cases where there is an "a" and a "p" it would indicate that on another call of the list, they answered present. Those on this list, who are marked "a" and who I do not know, are: whether they are white or black, are: No. 31, Van Lawrence is marked "a" and I don't know whether he is a white man or a negro. There is a question mark at that one. No. 44, Doug Merren, I [fol. 69] could not remember. C. F. Young, No. 46; No. 76, E. H. Hohn, New Caney and John Wiggins, No. 84, at Conroe. The ones I have just named are the only ones I don't know about, among the absentees. I just don't remember whether, on the first call of this list, any negroes answered on it. So far as I know, none did. On the second call, that is true. I don't know how many times we called it. That is true so far as I know. If there were more than two calls, I don't remember of any negroes.

Witness excused.

G. C. Moyston, a witness called by the defendant, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Johnson:

My name is G. C. Moyston. I am sheriff of Montgomery County. I have resided in the County all of my life. I was deputy sheriff before I was elected as High Sheriff.

I have served with the Sheriff's Department, about six years. That includes my Deputyship as well as officership. Mostly, I have lived about eighteen miles west of here and south. I have lived in and around Conroe a little over two years. My offices issued notice to the special venire in the Bob White case. We sent out notices. We sent out notices by postal card, I believe. I am fairly well acquainted throughout the county. I made bond for my office when I was elected to it first. As a deputy I assisted the former sheriff in making arrests and attending to his [fol. 70] business. I believe I know Mr. G. S. Whitley, of Conroe. I know Mr. S. P. Rehfers. He is a white man. I know Mr. Milton Myers of Willis. He is a white man. I know Mr. John Wiggins of Conroe. He is a white man. I know C. J. Nevill of Willis and I believe I know E. H. Hohn of New Caney. I can't say positively that I know people in the County by the name of Hohn. I am fairly well acquainted at New Caney. I can't place E. H. Hohn of New Caney, right now. I would probably know him if I would see him. I know J. J. Weldon and Doug Merren of Willis. They are white men. I know Reggie Scott, of Conroe. He is a white man. I am not positive whether I know C. F. Young or not. I know lots of Young's. I don't know which one C. F. is. I believe I know some negroes by the name of Young. I do not know whether I know C. F. Young or not. I would not be positive about that. I know Mr. T. B. McAlester, Route 2, Conroe. He is a white man. All of these men we have mentioned are white men. I don't know whether I know Van Lawrence of Conroe or not. I don't know whether he is the ball-player Lawrence or not. I would not say that all of the Lawrences I do know are white men. I was present a part of the time when the Bob White special venire was interrogated and sworn in. I believe I was present when they answered. I do not recall any members of the African race sta-ing up and being sworn. On the jury that tried Bob White, there were no negroes or members of the African race.

Witness excused.

[fol. 71] W. C. McClain, a witness called for the deefendant (oath being waived) testified as follows:

Direct examination.

By Mr. Johnson.

I am District Attorney in the Ninth Judicial District of Texas. As such, I prosecuted the case No. 8208 entitled The States of Texas, vs. Bob White charged with rape. I did that in Montgomery County. I don't think I made any agreement at any time with any of the defense counsel to excuse any negroes from the special venire called to try this case. I don't recall agreeing to excuse but about four or five men and all of them were white men. I don't know anything about any agreement with defense counsel to excuse any member of the African race.

Witness excused.

J. P. Rogers, who called himself as a witness for the defendant, testified as follows:

My name is J. P. Rogers. I am one of the attorneys for the defense in cause No. 8208, The State of Texas vs. Bob White. I observed the special venire group who answered to the roll call. I was present when the court called upon them to stand and be sworn. I did not observe any member of the African race among the special veniremen in this case who arose to be and were sworn by the court. I state [fol. 72] that there were no members of the African race among the group. There were no negroes in the court room at that time; that is, touching the venire.

Witness excused.

J. B. Stinson, a witness called by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is J. B. Stinson. I am Deputy Tax Collector. As such, I keep a roll of tax payers in the County; that is, the rolls from which juries are selected for service. I never

did know a man by the name of John Wiggins in Conroe but I have heard of him. He is a white man. I do not know Mr. E. H. Hohn. I do not find his name on the tax roll. I do not know C. F. Young of Conroe. We don't have him listed on the tax rolls. I do not know Van Lawrence, of Conroe. I do not find him on the tax rolls.

Lester McGuire, being recalled by the defendant, testified further as follows:

The Judge hands me the names from which to select this list of special veniremen. I have nothing to do with taking them off the rolls. The Jury Commission hands [fol. 73] them to the Judge. They seal them up and give them to the Judge and the Judge gives them to me. To see who were the Jury Commissioners for this term, I would have to look on my minutes and see. I do not know of my own knowledge, how the Jury Commission selected jurors for this term. So far as I know, it is customary for the Jury Com. oners of this County to select jurors for the term from the tax rolls of the County.

Witness excused.

J. B. Stinson, being recalled by the defendant, testified as follows:

Direct examination.

By Mr. Johnson:

As Deputy Tax Collector, I did not assist the jury commissioners in selecting these juries for this term of the Ninth District Court. As to who, in the Tax Assessor's Department furnished the rolls from which the jury commissioners were to select the jurors for this term of court, somebody out of the Sheriff's department usually comes in and asks for the rolls, stating that the jury commission wishes to use them. I do not know who it was that carried the volume to the Jury Commissioners for this term. The Sheriff usually sends in for the rolls. I don't know that they ask me every time. That is customary whether I know about this particular term or not. So far as I know, the purpose in obtaining the tax rolls from our office is to [fol. 74] make a selection from the tax payers.

Witness excused.

LESTER MCGUIRE, being recalled by the State, testified further as follows:

This case was tried at the July term of court. The jury commissioners that selected the juries for this term were appointed and served at the May term of this court. At that time, the Bob White case had never been transferred to Montgomery County. The Bob White case was transferred to this County on July 7th, 1938. So far as I know they never knew anything about the Bob White case. It was not on our docket at that time.

Witness excused.

Mr. Johnson: We now offer the entire list of the special venire submitted for the purpose of selecting a trial jury in the case of The State of Texas, vs. Bob White, No. 8208 in Montgomery County, under change of venue from Polk County, and on which jurors No. 31, 46 and 76 have not been identified by any of the witnesses and whose names do not appear upon the tax rolls of the County.

OFFER IN EVIDENCE

(The instrument so offered being as follows:)

The State of Texas: To the Sheriff or any Constable of Montgomery County, Greeting:

[fol. 75] Whereas, in a certain case pending in the District Court of Montgomery County, Texas, No. 8208 wherein The State of Texas is plaintiff, and Bob White is defendant, on the charge of the crime of rape, the following named 100 persons have been selected in the manner provided by law, to served as a special jurors, to-wit:

1. L. O. Gundy, Montgomery.
2. A. L. Brown, Conroe.
3. J. F. Gunter, Willis.
4. T. C. Weatherly, Montgomery.
5. M. S. Cartwright, Keenan.
6. H. Whatley, Richards.
7. Henry Williamson, Conroe.
8. J. Ross Brogdon, Montgomery.
9. J. H. Rose, Conroe.
10. Ira Mixon, Rt. 1, Conroe.

11. J. W. Sherrod, Conroe.
12. E. I. Hoke, Richards.
13. Lonnie Stoe, Conroe.
14. Levi Speer, Magnolia.
15. B. F. Andley, Willis.
16. Homer Bailey, Montgomery.
17. L. R. Yelverton, Pinehurst.
18. J. R. Horton, New Caney.
19. C. C. Duncan, Montgomery.

[fol. 76] 20. J. H. Raspberry, New Caney.
21. N. B. Parrish, Fostoria.
22. M. E. Kowis, Dobbin.
23. Virgil Gilliland, Conroe.
24. Mose Davis, Willis.
25. P. R. Carroll, Willis.
26. Henry C. Strickland, Splendora.
27. J. E. Persley, Willis.
28. J. N. Heaton, Pinehurst.
29. John McShan, Security.
30. C. A. Damuth, Magnolia.
31. Van Lawrence, Conroe.
32. T. B. McAiester, Rt. 2, Conroe.
33. M. L. Fultz, Conroe.
34. A. L. Lockhart, Conroe.
35. M. L. Fine, Willis.
36. Otis Sunday, Montgomery.
37. W. C. Brautigan, Pinehurst.
38. H. Gallimore, Conroe.
39. G. A. Evans, Montgomery.
40. Joseph Foster, Richards.
41. W. U. Harper, Rt. 1, Conroe.
42. J. J. Weldon, Willis.
43. J. E. Hardie, Willis.
44. Doug Merren, Willis.
45. Walter A. Dean, Rt. 2, Conroe.

[fol. 77] 46. C. F. Young, Conroe.
47. B. L. Nochols, Magnolia.
48. B. L. Brown, Willis
49. Reggie Scott, Conroe.
50. L. Law, Willis.
51. J. L. Davis, Montgomery.
52. J. R. Jackson, Sr., Montgomery.
53. J. A. Nutter, Conroe.

54. L. G. Helton, Montgomery.
55. R. A. Kingsberry, Willis.
56. W. W. Thomas, Willis.
57. Drew Carter, Conroe.
58. J. F. Tims, Richards.
59. J. W. Harris, Montgomery.
60. B. W. Williams, Richards.
61. I. L. Walker, Richards.
62. C. P. Matthews, Montgomery.
63. Claude Singleton, Montgomery.
64. H. M. Cable, Conroe.
65. E. M. Pool, Richards.
66. M. T. Hale, Security.
67. Horace P. Fullen, Montgomery.
68. G. W. Grisson, Richards.
69. J. Parker Perry, Conroe.
70. Andy Zumwalt, Conroe.
71. L. M. Weisinger, Conroe.
[fol. 78] 72. Jimmie Sanders, Magnolia.
73. H. P. Dennard, Montgomery.
74. J. R. Knight, Willis.
75. E. V. Triplett, Conroe.
76. E. H. Holan, New Caney.
77. C. J. Nevill, Willis.
78. C. E. Johnson, Rt. 2, Conroe.
79. E. D. York, Conroe.
80. E. W. Chambers, Conroe.
81. Luther Hall, Willis.
82. O. W. Ellis, Willis.
83. Julius H. Kidd, New Caney.
84. John Wiggins, Conroe.
85. John Howell, Willis.
86. C. E. Pool, Richards.
87. Walter Little, Rt. 2, Conroe.
88. E. P. Jones, Richards.
89. Coy Bellnoski, Willis.
90. J. W. Gibbs, Montgomery.
91. T. N. Castle, Montgomery.
92. Milton Myers, Willis.
93. J. D. Kelley, Conroe.
94. W. B. Granger, Conroe.
95. S. R. Hereford, Conroe.
96. A. P. Corley, Richards.
[fol. 79] 97. G. S. Whitley, Conroe.

98. S. J. Inglet, Willis.
99. L. M. Holmes, Montgomery.
100. B. Brantley, Magnolia.

Therefore, you are hereby commanded to summon each of the foregoing named 100 persons to be and appear before the Honorable District Court of Montgomery County, Texas, as the court house thereof in the town of Conroe, Texas, on the 2nd day of August, 1938, at 9 o'clock A. M. then and there to serve as special jurors as aforesaid in the above stated case.

Herein fail not but of this writ make due return, as the law directs, on or before Saturday the 30th day of July, 1938, at 11 o'clock A. M.

Witness Lester McGuire, Clerk of the District Court of Montgomery County.

Given under my hand and seal of said court, at office in Conroe, Texas, this 26th day of July, 1938.

Lester K. McGuire, Clerk, District Court, Montgomery County. (Seal.)

OFFICER'S RETURN

I, G. C. Moyston, Sheriff of Montgomery County, Texas, do hereby certify that I have executed the within summons in the manner and at the date above set out, and that in my failure to summon certain jurors above named, I truly state the diligence and give the reason why I failed [fol. 80] to summon them.

G. C. Moyston, Sher-ff, Montgomery County, Texas, by Cy Adkins, Deputy.

Indorsed: No. 8208. The State of Texas vs. Bob White. Special venire. Issued the 26th day of July, 1938. Lester K. McGuire, Clerk, District Court, Montgomery County, Texas. Filed July 27, 1938; Lester K. McGuire, Dist. Clerk, Montgomery County, Texas, by Dorothy Glass, Deputy."

W. C. McCLAIN, resuming the witness stand, testified as follows:

Mr. McClain: My name is W. C. McClain. I am District Attorney for the Ninth Judicial District of Texas. I was present at the time the defendant made his motion for change of venue from Polk County, Texas in cause No. 7188 in that court, now appearing on the docket of the

District Court of Montgomery County, Texas as No. 8208, The State of Texas vs. Bob White. I will state that the change of venue was had on the same date and the transcript on change of venue was filed in the District Court of Montgomery County, Texas, on July 7th, 1938; that before the change of venue was had, there was no motion filed for quashing the venire. That in cause No. 8208 wherein was filed defendant's first application to quash the special venire, I was present here in the District Court at the time said motion was filed and at the time the same was presented [fol. 81] to the court, and there was no testimony offered in support of such motion or application; that the Court asked defendant's counsel if they cared to offer any testimony and they answered "no" and no testimony was offered in support of the motion. I offer in evidence at this time the defendant's motion for change of venue filed among the papers on July 6th, 1938; also offer the court's order changing the venue. I offer the file mark in cause No. 8208, The State of Texas vs. Bob White showing papers for change of venue were filed July 7th, 1938, by Lester McGuire, District Clerk.

Cross-examination.

By Mr. Johnson:

I was present here in court in this county when your motion to quash the indictment was handed to the court and presented to the court. I don't know when it was first presented to the court, but I know that it was presented to him in the court room. I was present here then. I remember when I filed our answer to it. My first knowledge of the motion was when it was filed in court and I filed an answer to it and the court asked you if you wanted to offer any evidence in support of the motion and you answered "no". That is the first I knew about the motion. I took it and went outside of the court room and prepared an answer to it. I don't know that that occurred at least an hour or an hour and a half after the motion was filed with the Clerk and presented to the court. I do not know how long it had been filed. But as soon as I saw it had been filed, I took it around and prepared an answer to it. I don't know of my [fol. 82] own knowledge what the court said with reference to the motion of his own volition before our answer was filed. If he told you something I didn't know it.

This venire list here was issued July 26, 1938. That was after the Bob White case was transferred here on change of venue. Of course he would not have ordered the venire before the case got here. The return on there of course, is subsequent to the date of issuance.

I do not know of any members of the African race who were on that special venire in this case. I do not know Mr. Van Lawrence, of Conroe. I may know Mr. C. F. Young, if I were to see him but I don't know him now. I do not know E. H. Hohn of New Caney, that I know of.

Witness excused.

W. H. GRAHAM, being called by the defendant, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

My name is W. H. Graham. I am Acting Court Reporter for the Ninth Judicial District of Texas, and was such at the date of the trial of The State of Texas vs Bob White, No. 8208 in the District Court of Montgomery County, which trial started on August 2, 1938, and ended, so far as the testimony was concerned on August 4th, 1938. I reported [fol. 83] that case in shorthand from beginning to end, including all addresses of counsel to the jury.

After conviction, I was asked by defendant's counsel to prepare a memorandum of objections and exceptions taken by the defendant throughout the trial. I did that by searching my notes for any exceptions made by defendant's counsel, and when I found one, I transcribed the remarks concerning each exception, with so much of the testimony as made the objection full enough to form the basis for an assignment of error; along with any objection made, any ruling of the court and any exception and also any testimony offered, but not admitted, inc[illegible] the reasons for offering it, if any was stated, as well as exceptions to anything that happened to which an exception was lodged. I attached my certificate to such transcript and delivered it to counsel for defendant and the transcript which you now show me is the transcript of such memorandum of objections and exceptions.

Mr. Johnson: We offer that transcript in support of our motion for new trial. We offer that part of the transcript

on page 44 in connection with paragraph 10 of the motion for new trial. In connection with paragraph 13 of the motion in which we excepted to the court refusing to permit the defendant to testify whether or not he had been recently injured. Then we offer the point as submitted by the clerk (reporter) in support of paragraph 10 of the motion for new trial; paragraphs 11 and 12; one was the handing of the document to Bob White and the other is with reference to permitting Bob to testify that at the time he was in [fol. 84] Beaumont, where Mr. Foreman asked him if he said that he answered yes and the court sustained an objection to it; then the other one No. 12-No. 13, about had he recently been injured and he said yes and that was stricken by the court.

No. 14, Private Prosecutor Z. L. Foreman made this statement: It does not make any difference to Mr. Johnson or Mr. Rogers what happened to Mrs. Cochran. As far as they are concerned their innocent negro should be turned loose. Of course the record shows that the court instructed the jury not to consider that.

Mr. Campbell: We are not agreeing to any excerpts of any testimony.

Mr. Johnson: We offer that in support of our motion for new trial. Paragraph 16 (about sheriff Holiday's perserverance and soon—in Mr. Foreman's argument to the jury.

With reference to No. 17, in the court permitting the state to re-open the case and recall the prosecutrix.

[Argument omitted.]

Mr. Johnson: The defendant excepts to the order overruling the motion. (The court had previously stated that the motion "is overruled".)

[fol. 85] REPORTER'S CERTIFICATE

I, W. H. Graham, Acting Official Reporter in and for the Ninth Judicial District of Texas, of which Montgomery County is a part, do hereby certify that the above and foregoing twenty-eight (28) pages contain a full, true and correct transcript, in narrative form, of all the proceedings had upon the hearing of motion for New Trial, before Hon. W. B. Browder, Judge Presiding, in cause No. 8208, The State of Texas vs. Bob White, which hearing was had and held on August 26th, 1938 in the District Court of Montgomery County, Texas.

Witness my signature, at Conroe, Texas, on this the 14th day of September, 1938.

W. H. Graham, Acting Official Reporter, as aforesaid.

AGREEMENT

Agreed and approved by attorneys for both the State and Defendant.

ORDER

Approved and order—filed this the 28 h day of September, A. D. 1938.

W. B. Browder, Judge Presiding; W. C. McClain, District Attorney for 9th Judicial Dsitrict; J. P. Rogers, W. J. Johnson, S. F. Hill, Attorneys for Defendant.

[fol. 86] [File endorsement omitted.]

[fol. 87] IN COURT OF CRIMINAL APPEALS OF TEXAS

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

Now comes J. P. Rogers, counsel for Petitioner, and Gerald C. Mann, Attorney General of Texas, and L. W. Davidson, counsel for Respondent in the above styled and numbered cause and request that the Clerk of the Court of Criminal Appeals of Texas, at Austin, Texas, make and prepare from the transcript in the above and entitled cause on file in his office the following instruments, to-wit:

Indictment.
Defendant's first Application to Quash the Special Venire and Indictment.
State's Answer.
Charge of the Court.
Judgment of Trial Court.
First Amended motion for New Trial.
State's Answer to Defendant's Motion for New Trial.
Order Overruling Motion for New Trial.
Bill of Exception No. 1.
Bill of Exception No. 2.

OPINION.

Judgment of Court of Criminal Appeals.
Opinion on Motion for Rehearing.
Testimony heard on Motion for New Trial in Lower Court.

Witness our hands, this the 30th day of September, A. D. 1939.

J. P. Rogers, Carter Wesley of Council, S. F. Hill, L. W. Davidson, Gerald C. Mann, Attorney General of Texas by W. F. Merry, First Assistant Attorney General.

[fol. 88] CLERK'S CERTIFICATE

I, Olin W. Finger, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that the above and foregoing are true and correct copies of that part of the record in cause No. 20188, Bob White, Appellant, vs. The State of Texas, Appellee, referred to in stipulation signed by counsel for said parties, incorporated herein, as the same appear on file and of record in my office.

Witness my hand and seal of said Court, this the 30th day of September, A. D., 1939.

Olin W. Finger, Clerk. (Seal of Court of Criminal Appeals of Texas.)

[fol. 89] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 25, 1940

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis Enter Carter Wesley. File No. 43,494 Texas, Court of Criminal Appeals, Term No. 87. Bob White, Petitioner, vs. The State of Texas. Petition for a writ of certiorari. Filed June 6, 1939. Term No. 87 O. T. 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

J. P. Rogers,
S. F. Hill,
Counsel for Petitioner.

Carter Wesley,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States of America:

Bob White, plaintiff in error, in the above styled and numbered cause, shows by this petition to this Honorable Court that in the records, proceedings, and decisions herein, the same being the highest Court in the State of Texas in which a decision could be had in this case (the same being a criminal case in which the said Bob White was indicted in the District Court of Polk County, Texas, and by change of venue the same was tried in Montgomery County, Texas) for the offense of rape, was tried in said Montgomery County and a conviction resulted in which he was given the extreme penalty of death therefor.

The case was appealed to the Court of Criminal Appeals and was affirmed by said Court on February 15, 1939, and a motion for rehearing was, by said court, overruled on May 17, 1939.

That manifest error occurred in both the Trial Court and the Court of Criminal Appeals to the great damage of the said Bob White, in that:

1.

The court erred in not sustaining plaintiff in error's motion to quash the indictment in this cause in the District Court of Polk County, Texas, for the reason that all negroes were excluded from such Grand Jury because they were negroes.

2.

The court erred in overruling plaintiff in error's motion to quash the Special Venire before which he was tried in Montgomery County on change of venue because all negroes were excluded from the Special Venire which tried him therein, because they were negroes.

3.

Plaintiff in error would respectfully submit to this Honorable Court that in support of both the above reasons it was shown that no persons of the African race or negroes were on the Grand Jury which indicted him for this offense and none on the Special Venire which tried the same, and he being a negro has been discriminated against because thereof, and the undisputed evidence on the motion for new trial discloses the same to be the fact and that there had been no negroes drawn and none served on the Grand Jury in Polk County where the indictment was returned against him and had not been for many years last past, it having been shown by the Jury Commission who selected the Grand

Jury that there were many negro taxpayers in Polk County, but that none of them had been drawn on said Grand Jury, because they were negroes.

4.

Plaintiff in error would further show to this Honorable Court in support of this motion that it was shown that there were no negroes of the African race, of which he is a member, on the Special Venire, which tried him, and for such reason he has been discriminated against because of his race and color and the undisputed evidence in the motion for a new trial discloses such to be the fact, that is to say, that no negroes were drawn and none served on such Special Venire in Montgomery County, for many years, where the charge against this plaintiff in error was tried. That said discrimination was in violation of the Fourteenth (14) Amendment to the Constitution of the United States, which guarantees equal protection under the law to the white race and the negro race alike and a denial to him of such rights guaranteed under the Constitution of the United States would show to this Honorable Court that he has not had a fair and impartial trial and that he has been denied a legal and constitutional right guaranteed him by the Constitution of the United States. That it was shown by the evidence at the motion for a new trial in Montgomery County, Texas, that the plaintiff in error was discriminated against by reason of the fact that he is a member of the negro race and that, therefore, a constitutional right, guaranteed him by the Constitution of the United States, has been denied him.

WHEREFORE, plaintiff in error prays that a writ of certiorari be allowed and that a transcript of the records, proceedings, and papers upon which said decree was rendered, opinion based, and motion for rehearing was overruled, duly authenticated, be ordered sent to the Supreme Court

of the United States of America at Washington, D. C, so that the rules of such Court in such case made and provided in order that the same may be by such Honorable Court inspected and corrected in accordance with law and justice.

J. P. Rogers.
S. F. Hill.

Carter Wesley,
Of Counsel.

Assignments of Error.

Now comes Bob White, plaintiff in error, above named, and files the following assignments of error upon which he will rely, upon his prosecution of the appeal in the above entitled cause from the decree of the Court affirming the same on February 15, 1939, and the further decree in denying his motion for rehearing made May 17, 1939.

1.

The Court of Criminal Appeals of the State of Texas erred in overruling plaintiff in error's motion to quash the indictment, returned against him in this cause by the Grand Jury of Polk County, Texas, for the reason that all negroes and members of the African race were excluded from such Grand Jury because of the fact that they were negroes and members of the African race.

2.

The Court erred in overruling his motion to quash the Special Venire, before which he was tried in Montgomery County, Texas, on a change of venue from Polk County, Texas, because all negroes were excluded from the Special Venire which tried him on such indictment, because of the fact that they were negroes.

WHEREFORE, plaintiff in error prays that the judgment and sentence of the Court of Criminal Appeals of the State of Texas be reversed and that it be ordered to enter a decree reversing the decision of the lower court in this cause.

J. P. ROGERS.
S. F. HILL.

CARTER WESLEY,
Of Counsel.

(7618)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE, *Appellant*,
v.
STATE OF TEXAS, *Appellee*

Appealed From the Court of Criminal Appeals of the State of Texas, Austin, Texas

---

BRIEF FOR APPELLANT

J. P. ROGERS,
S. F. HILL,
Attorney for Appellant
Houston, Texas

CARTER W. WESLEY,
Of Counsel

GILLESPIE-ALPHA CO., HOUSTON

SUBJECT INDEX

LIST OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE, *Appellant*,

v.

STATE OF TEXAS, *Appellee*

Appealed From the Court of Criminal Appeals of the State of Texas, Austin, Texas

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BRIEF FOR APPELLANT

Preliminary Statement

Appellant, Bob White, a negro, was indicted at a special August Term, 1937, of the District Court of Polk County, Texas, charged with the offense of rape on Ruby Cochran (an adult, a white woman).

At the time this indictment was returned by the special

grand jury in Polk County, Texas, the regular District Court for the Ninth Judicial District was then in session at Conroe, Texas, both being held in the same district at the same time by the same district judge.

Art. 1920, VERNON'S ANNOTATED CIVIL STATUTES, provides for holding special terms of our district courts. It is obvious that the same court cannot be in session at the same time in two different counties, and this Court does not know when the regular terms of the Ninth Judicial District Court are held in the several counties composing that district. Art. 199, Section 17, Subdivision 9 thereof, provides in substance that the Ninth Judicial District Court shall be held in Polk County on the first Monday in January and July of each year, and may remain in session three weeks, and such court shall be held in Montgomery County on the eighteenth Monday after the first Monday in January and July of each year, and may remain in session six weeks; and on the third Monday after the first Monday in January and July, each year, and may remain in session six weeks. It is, therefore, obvious that the Ninth Judicial District Court was in session in Montgomery County at the time the transcript indicates this special term of the court for Polk County was called, unless this special term of the court in Montgomery County had temporarily adjourned. We submit that no order can be shown in this record, showing the temporary adjournment of said District Court at said time for Montgomery County, —WILSON v. STATE, 223 S.W. 217.

Again, a special term of our district courts may be called for general purposes, or for any specific purpose. If a special term of the Ninth Judicial District Court for Polk County was called because of unfinished business, and defendant being indicted at said term, we doubt if the court had such power, because the order calling the same limited the scope of its

business. On termination of special term, see STEPHENSON v. NICHOLS (Com. App.), 286 S.W. 197. On temporary adjournment of one court to call a special term of another, see WILSON v. STATE, 223 S.W. 217. On matters which may be considered at special term, see CHANT v. STATE, 166 S.W. 513; EX PARTE HOLLAND, 238 S.W. 654; STEPHENS v. STATE, 245 S.W. 687.

This case was transferred to the District Court of Montgomery County at Conroe, Texas, and on the 5th day of August, 1938, this case was called for trial and afterward the jury (composed of white men exclusively) brought into the court the following verdict, which was received by the court and entered upon the minutes of the court, as follows, to wit: "We the jury find the defendant, Bob White, guilty as charged in the indictment and assess his punishment at death."

The motion for new trial was filed on August 5, 1938, and was later overruled by the court, to which action of the court defendant by counsel then and there in open court excepted and gave notice of appeal to the Court of Criminal Appeals of the State of Texas.

Defendant was given thirty days in which to file Bills of Exception and Statement of Facts.

The Statement of Facts and Bills of Exception were filed in due time and for the reasons hereinafter set out in this brief, it is pointed out to this Honorable Court, where the trial court was in error in overruling defendant's motion for a new trial and for errors herein pointed out it is the contention of the appellant that this case should be reversed and cause remanded.

Appellant's First Assignment of Error

The court erred fundamentally in overruling appellant's motion to quash the indictment in this case and also to quash the special venire. *The Jury Commissioners* in selecting the Grand Jury of Polk County where defendant was indicted failed and refused to select any member of the colored race as members of the Grand Jury, and further that the Jury Commissioners failed and refused to select any member of the colored race on the Special Venire drawn in Montgomery County, Texas, where said cause was tried. That this was purposely done and in support of the appellant's contention it will be shown by the Statement of Facts on motion for new trial in this cause on page 3 of said Statement of Facts, W. H. Freeman, a member of the Jury Commission, who drew the Grand Jury that indicted Bob White, testified (S.F. p. 3): "As a member of that Jury Commission I did not select any negroes as members of the Grand Jury to try Bob White. We took the men as we came to them and tried to get as good men as we could to serve in this case. I know that there are negroes in that county who were freeholders and householders; quite a number of them. We did not discuss the negroes to serve as veniremen. We took men that we thought were qualified to serve on the Grand Jury and venire in the case. These men who served as Grand Jurors in that case were men that had lived in the county over a long period of years. They were men with good reputations in the county where they lived."

Authorities

We would respectfully submit to this Honorable Court for its consideration that the defendant has

not had a fair and impartial trial as guaranteed him under the Constitution of the United States. That in support of our contention that no negro being drawn on the Grand Jury, and that this was purposely done as is shown by the record in this cause which reflects the fact that not only in the trial of this case, but for some time prior thereto no negroes have served on either the Grand Jury venire or Petit Jury in Polk County, Texas.

Appellant's Second Assignment of Error

The court erred in permitting the State to offer in evidence the purported written confession of the defendant, Bob White.

Counsel for appellant objected to the introduction of this confession because it was not a voluntary confession and was made under duress. That the defendant could not read or write and did not understand what he was signing if he did sign said statement.

The record in this case reflects the facts that at the time said confession was made appellant was in jail at Beaumont, Texas; that officers were present at the time, some of whom had just prior to this taken the defendant out of jail and into the woods. Defendant testified that these same officers chained him to a tree and gave him a severe beating and threatened to kill him unless he made a confession.

That said confession was dictated by Mr. Foreman, a special prosecutor in this case, and was written by Ernest Coker, County Attorney of Polk County, Texas, who were highly prejudiced against this defendant and seeking his conviction. That this defendant is an ignorant negro and can neither read or write and this instrument shows clearly that he did

not and could not have possibly dictated the same. (Saved by Bill of Exceptions No. 3, Tr. pp. 49, 50 and 51, and made a ground for new trial.)

The undisputed facts as disclosed by the records in this case show that while appellant was incarcerated in the jail in Polk County, Texas, that he was taken to the woods by officers and rangers on numerous occasions. The appellant, Bob White, testified (S.F. p. 96), "I remained in jail over and about seven or eight days and during that seven or eight days I was taken out of that jail four nights straight. While I was out in the woods there, them rangers whipped me. Every time they taken me out they whipped me and every time they carried me back to the jail they told me I better not tell it. They took me to Beaumont about three or four days after they got through with whipping me."

This purported confession shows on its face that it could not have been dictated by the appellant who was an ignorant negro who can neither read or write.

There was no other evidence in this case tending to show appellant's guilt except by the remotest of circumstantial evidence and the admission of this confession was done over the objection of counsel for the appellant.

There is no identification of the defendant as the person who committed the offense other than that contained in said purported statement, which statement was obtained after at least one week of mental and physical coercion and fraudulent persuasion in a strange community under the influence of the presence of the officers who testified that they had taken the defendant from jail during the period in between the time of his arrest and the time of making his confession, and at such times had taken him down the road

and off the road and into the woods so many times the number thereof could not be remembered, and in this connection the prosecutrix did not in the slightest manner identify the defendant.

The State relied for a conviction solely on the confession of this defendant which was not a voluntary confession, does not meet the requirements of the statutes, was made in a strange place under coercion and persuasion, and should not have been admitted, especially because of the aforesaid reasons.

Appellant's Third Assignment of Error

The court erred in permitting the following proceedings to be had during the trial of said cause. While the defendant was on the witness stand there were several remarks made by counsel for the State and also of the court as follows: Mr. Campbell: "We want to know who 'they' are." Mr. Foreman: "It might have been John D. Rockefeller." The Court: "I will ask you to prove who 'they' were." Mr. Pitts: "I said it was the Texas Rangers."

These remarks were made in the presence and hearing of the jury. Timely objections were made to the same as is shown by the Bills of Exception. (No. 4, Tr. p. 52.)

Appellant's Fourth Assignment of Error

Private Prosecutor Z. L. Foreman in his argument to the jury made this statement: **"It does not make any difference to Mr. Johnson and Mr. Rogers what happened to Mrs. Cockran. As far as they are concerned their innocent negro should be turned loose."**

These remarks involving defense counsel were highly in-

flammatory and not borne out by the record and to which timely objection was made. (Saved by Bill of Exception and made ground for new trial, Tr. p. 28.)

Z. L. Foreman in his argument in this case at another time used this language: "I do not believe Ernest Coker would have thought of it. I do not believe Appling would have thought of it. I do not know I would have thought of it."

This and other remarks of counsel were objected to because counsel was entirely outside the record and although admonished by the court to stay in the record, the harm had already been done.

Appellant's Fifth Assignment of Error

Z. L. Foreman, private prosecutor, in his argument before the jury, used this language: "I have seen Holiday (referring to Polk County sheriff) in lots of situations where I thought he would never work it out, but he did work out of it. I have never seen a sheriff with as much perseverance and willing to go at any time and help the solution of crime in any jurisdiction he has been there. HE HAS NEVER HAD ONE YET HE DID NOT SOLVE. I happened to know about him for I worked with him for ten straight years."

Regardless of the admonitions from the court Mr. Foreman persists in arguing facts not brought out by the evidence. We submit the foregoing remarks are clearly outside the record and counsel as giving evidence to the jury of facts not testified to by any witness, and while the court instructed the jury not to consider these remarks, counsel had already testified to facts not heretofore disclosed by the evidence and a fact that was very material in that this case was based

entirely on circumstantial evidence except the purported confession of Bob White.

This Honorable Court many times has had to pass on this same question of State's counsel testifying before the jury without being sworn and in the case of ESTANCHEL v. STATE, 231 S.W. 120, this same question was passed on. That case was one in which the defense was an alibi, the defendant claiming to have been at home and asleep at the time the offense was committed. His father was subpœnaed as a witness in his behalf and although in his behalf and although in attendance in court, was not used as a witness. In the argument the District Attorney stated to the jury that defendant's father was not put on the stand because he had told the arresting officer before he knew his son was arrested that defendant did not get home until 10 o'clock on the night of the robbery and because he was already "sewed up." In this case the trial judge reprimanded counsel and instructed the jury not to consider this argument. This Court held that this was a damaging statement against appellant and we can not hold the same to have been harmless in view of the penalty inflicted.

In the case of HAGGARD v. STATE, 269 S.W. 403, counsel for the State used this language: "Gentlemen of the Jury: Who is the defendant's witness? Dr. Goolsby. I know him and have no confidence in his testimony. I have had many cases in this district for the State and I always find said witness testifying for the defendant."

The jury was instructed to disregard these remarks. In this case the court laid down this rule: The unsworn statement of the State's counsel to the jury of a material fact adverse to defendant which was not put in evidence during the trial will require the judgment of conviction to be set aside.

In the case of BRISTER v. STATE, 262 S.W. 82, the District Attorney used this language: "That in his oath he believed defendant guilty and that the jury would not be doing their duty in upholding their offices if they did not convict him." In this case it was held that this was such error that although there was an instruction not to consider the same, this could not remove the injurious effect.

We submit that this case is in line with the one at bar. This statement of Private Prosecutor Z. L. Foreman about the efficiency of the sheriff, Holiday, in always solving every case was a statement very damaging to the appellant, Bob White. Sheriff Holiday was a witness in this case and the statement made by counsel was of such harmful nature that should require reversal of this case alone if there was no other error in the record. Considering the fact that appellant was given the extreme penalty of the law and that the statement made by counsel to a material fact not borne out by the evidence should require reversal.

Respectfully submitted,

J. P. ROGERS,
S. F. HILL,
Attorney for Appellant
Houston, Texas

CARTER W. WESLEY,
Of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF OF THE PETITIONER ON PETITION FOR REHEARING BY THE STATE OF TEXAS.

F. S. K. WHITTAKER,
Counsel for Petitioner.

CARTER WESLEY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

BRIEF OF PETITIONER IN OPPOSITION TO PETITION OF THE RESPONDENT FOR REHEARING ON CERTIORARI GRANTED PETITIONER AND REVERSING OF JUDGMENT OF COURT OF CRIMINAL APPEALS OF STATE OF TEXAS.

To the Honorable the Supreme Court of the United States:

Your Petitioner, Bob White, shows in opposition to the granting of the petition for rehearing on behalf of the Respondent, State of Texas, the following:

A.

Summary Statement of the Matter Involved.

1. PRESENT STATUS OF THE CASE.

This Honorable Court on the 25th day of March, 1940, entered in this cause, the following order, to wit:

"Per Curiam: The motion for leave to file a petition for rehearing is granted, and the petition for rehearing is granted.

> The order entered November 13, 1939, is vacated. The motion for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted and the judgment is reversed. Chambers *v.* Florida, No. 195, decided February 12, 1940; Canty *v.* Alabama, No. 634, decided March 11, 1940.
>
> The mandate is ordered to issue forthwith."

On the "Order Allowing Certiorari" on the same date, this Court stated:

> "The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted.
>
> And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ." (Fol. 89) (R. 163).

In due course, the State of Texas, filed in this Court its Petition for Rehearing, and by order of this Court entered on April 22, 1940, set this cause to be heard on this petition for May 20, 1940, on the State's contentions upon the questions set forth in subdivisions (e), (f), (g), (h) and (j) of paragraph 4. (Respondent's petition pp. 6-8).

The record in this cause and now before this Court reflects that in the court below, Bob White, Petitioner herein, was last convicted of the capital offense of rape by assault and his punishment fixed at death, in the District Court of Montgomery, Texas, on August 5, 1938 (R. 16-17). This judgment was appealed to the Court of Criminal Appeals of the State of Texas, being the highest court in criminal cases where an opinion can be had, and was in all things duly affirmed, on March 22, 1939, by this Court of Criminal Appeals. The judgment of which court became final on May 17, 1939, when the motion for rehearing was overruled. (R. 132-143.)

The petitioner on June 6, 1939, filed his application for a writ of certiorari to the Court of Criminal Appeals of

Texas in this Court, and was by this Court denied on November 13, 1939, which order was, on motion for rehearing, vacated by this Court on March 25, 1940, as heretofore shown. The Court of Criminal Appeals upon receipt of the mandate of this Court issued on March 25, 1940, and in response thereto, entered an Order, dated, April 3rd, 1940, arrested the mandate and all proceedings to enforce the judgment of the trial court and the Court of Criminal Appeals and stayed the same until further order of that court. (Respondent's petition pp. 9-10).

The petitioner Bob White is still held by the Warden of the State Penitentiary at Huntsville, Texas, under the death sentence of the State courts pending further action on the petition for rehearing by this Court on the State's application.

Opinion Below.

The opinion of the Court of Criminal Appeals of the State of Texas, from which the writ of certiorari was granted is reported in Vol. 128, Southwestern Reporter, 2nd Series at page 51 *et seq.* The other opinion out of which this case grew is reported as *White* v. *State*, 117 S. W. 2d. 450.

Jurisdiction.

This Court by granting the writ of certiorari on March 25, 1940, on the Petitioner's Motion for Rehearing has determined the question of jurisdiction, and by reversing the judgment of the Court of Criminal Appeals has determined that the record reflects the same constitutional questions raised and adversely decided by the State court as were raised and adversely decided by the Supreme Court of Florida, as reported in *Chambers* v. *State*, 187 Southern Reporter p. 156, 136 Fla. 568, which case was reversed by this Court in *Chambers* v. *Florida*, No. 195, decided February 12, 1940. This Court affirmed this holding on March

11, 1940, in *Canty* v. *Alabama*, No. 634, and by granting the writ of certiorari, and reversing the judgment of the Court of Criminal Appeals of the State of Texas, in this present cause, again reaffirmed the *Chambers* v. *Florida* case and the *Canty* v. *Alabama* case.

Statement of the Case.

On or about August 10th, 1937, the State alleged that one Mrs. Ruby Cochran, a member of a prominent white family living on a farm about 12 miles from the town of Livingston, in Polk County, Texas, was raped by violence in her home, about 11 p. m., where she had retired in an upstairs bedroom. The prosecutrix testified that the attack upon her was on a Tuesday night, with no one at home with her, except her two little boys, who at that time were sleeping on cots on the sleeping porch (R. 73). That at that time her husband, called "Dude" Cochran, was absent. She was unable to identify the petitioner as her assailant or any one else. She finally testified that the party who raped her on the night of August 10th, was undoubtedly a Negro" (R. 78).

There is no testimony in the record to show who gave the alarm after the alleged rape; there is nothing in regard thereto in Mrs. Cochran's testimony (R. 71-78). C. L. Cochran, brother-in-law of the prosecutrix testified that at the time of the alleged assault he was in Livingston, Texas, which is about twelve miles from the home of prosecutrix. That he heard of the "assault" around ten o'clock on the night of August 10, 1937, that his brother Ernest, also there in Livingston "phoned" him the news. That he "phoned Mr. Carlisle to go to Dude's house as quickly as he could, and that he notified Sheriff Holliday and one Mr. Kimble, and that when he and his brother arrived at his brother's home, Mr. Carlisle was there, and sheriff arrived just a little ahead of him. That he was present when a search

was made of the entire house for evidence, and that all of them went through the house together (R. 67-69). Later the Sheriff of Walker County, arrived on the scene where the alleged assault took place with blood hounds from the State penitentiary at Huntsville, Texas, although there were bare foot tracks around the Cochran house, the dogs were not allowed to track. A finger print expert arrived from Lufkin to make an examination of the premises (R. 56).

The next day, Wednesday, August 11, 1937, between the hours of 9 and 10 a. m., Bob White, Petitioner, while working in a field near his home; was taken into custody by Ernest Cochran, the brother-in-law of the prosecutrix. Bob, at that time, lived with his mother on a farm approximately two miles from the Cochran home, in a house about 300 feet from a dirt road (R. 71-72 & R. 89). Sheriff Holliday testified that he carried Bob White to Ernest Cochran's home in Livingston, where with fifteen or sixteen other Negroes, previously arrested, were carried before the prosecutrix, questioned and later placed in Jail (R. 52-54). He further testified that although he held Bob White and about 15 or 16 others and charged all of them with the same offense, he did not file a complaint against any of them, but he held them for observation (R. 58). These Negroes together with Bob White were held in the Livingston jail several days (R. 54). Later around about August 18, 1937, Bob White was removed to the Beaumont jail by Sheriff Holliday (R. 54) when the alleged confession was obtained (R. 33).

On the day Bob White was arrested, two Texas Rangers, M. W. Williamson and E. M. Davenport were sent from Houston, Texas, to Polk County by Captain Purvis of the Rangers to aid the sheriff and others in the investigation of the alleged assault upon Mrs. Cochran. Also Coleman Weeks, a peace officer from Livingston, Texas, worked with

these Rangers in the case (R. 124-128). These are the three officers which Bob White identified as being ones who tortured him in the woods in the attempt to make him confess the crime (R. 88-93).

Bob White, to the indictment charging him with rape by violence on the prosecutrix (R. 1-2) on or about the 10th day of August, 1937, pleaded "Not guilty" (R. 13), and at the trial thereon before the Hon. Judge Browder, denied the assault and asserted that at the time of the alleged assault he was at home sleeping and further that due to the fact that he was suffering from a disease at that time, which made him unable to have sexual intercourse with any one (R. 88-89). He testified in substance that after his arrest about 9 o'clock on the morning August 11, 1937, which was Wednesday, he never was turned loose again. He stated that he was carried to Dude's Cochran home where the alleged attack took place, and from there he was taken to the court house in Livingston where he was finger printed, and from there he was taken to Livingston jail, where he remained seven or eight days. He stated that while he was being held in the Livingston jail, beginning that Thursday night, he was taken out handcuffed by Texas Rangers and carried into "the woods somewhere" where he was whipped by these officers with what he supposed to be a rubber hose (R. 89). He stated that he was carried out in the woods again by these officers "several nights in a row, and each time he was hand-cuffed, and each time they whipped him, and each time they told him that he had better not tell that they had him in the woods, and to say, that they had him at the court-house talking to him (R. 90). The third night he was taken out, he was hand-cuffed and locked to a tree, and after getting out of his pants, upon the command of the officers, they whipped him, and that time he was asked about a confession they desired him to make. "Well, he asked me, he says you ain't going to say

you did it and I told him no, sir. He said then you are going to say you did it when we git through wid you. I told him I was not going to say I done it" (R. 90).

Bob White in testifying to the statement introduced by the State at the trial before Judge Browder, stated that Mr. Coker (County Attorney of Polk County at that time) made that statement, as he could neither read nor write, nor understand what he put in that statement (Note. Reference is here made to the alleged confession of Bob White, marked as Exhibit 1, appearing in Record on pages 35 to 41). He testified further in substance that Rangers M. W. Williamson, and E. M. Davenport, and Coleman Weeks, whom he later identified in court (R. 92-93) as being same officers who had taken him from the Livingston jail at night into the woods and whipped him, and the other nights during the time he was in the jail. That Sheriff Holliday took him to Beaumont after the Rangers got through whipping him, on a Saturday night and held him over until Sunday morning while they made that "statement"; and during that time in Beaumont jail, he saw Rangers Williamson, Davenport and the officer Weeks and others. He denied being warned that he did not have to make a "statement" or anybody telling him that such "statement" if made would be used in the trial against him. Also denied making a voluntary statement about assaulting Mrs. Cochran. He also stated that during the time he was out in the woods with the officers some one of them struck him on his head, which affected his hearing, and that while he was being held in Beaumont at the time the "statement" was made he was kicked by a Ranger, when he dozed off to sleep (R. 88-93). Bob stated that while he was in Beaumont he was not given an opportunity to get an attorney or lawyer, that he "knowed" no lawyer, and none of his people was there (R. 91).

The trial there before Judge Browder at Conroe, Montgomery County, Texas, resulted in a verdict of guilty as charged and punishment fixed at death (R. 16-17), in due course motion for new trial was filed and overruled (R. 25) which judgment was affirmed by the Court of Criminal Appeals (R. 141) which became final on the Order denying a Rehearing (R. 141-143).

B.

Reasons Relied On for the Denial of the Respondent's Petition for Rehearing.

1.

This Court reached a correct decision in granting the leave to file the Motion for Rehearing and granting the Motion for Rehearing, vacating the Order of November 13, 1939 entered by this Court, granting the Writ of Certiorari and reversing the judgment of the Court of Criminal Appeals of Texas:

a.

The citation of *Chambers* v. *Florida*, No. 195, decided by this Court on February 12, 1939, and *Canty* v. *Alabama*, No. 634, decided March 11, 1940, as authority for the granting of the writ and reversing the judgment of the lower courts, is fully sustained by the record in this cause.

(1) The State's evidence concededly shows compulsion was used in obtaining the alleged confession.

The Criminal Appeals' Court of Texas in overruling the Bill of Exception No. 3 (R. 29-32) of Bob White which complained of the introduction of an alleged confession in evidence, because the same was extorted from him by means of whipping, violence done to him, and under duress and threats, rendering the same involuntary, as set forth in the thirteen paragraphs in the said bill, approved the submission of the burden of the appellant's objections to the

jury by the trial court, and also its refusal to sustain the objections of the petitioner Bob White, to its admission in evidence and being read to the jury, as reflected by the bill (R. 29-32). This was a holding in substance and effect by the Court of Criminal Appeals that the alleged confession as presented by the State and allowed in evidence over timely objections, raised merely issues of fact respecting its involuntary nature, and was thus, within the province of the jury to decide whether the evidence beyond a reasonable doubt showed that the confession so called was obtained under duress, violence, coercion, fear or other improper influences.

In deference to the Court of Criminal Appeals an examination of the evidence presented on behalf of the State concededly show that the alleged confession was obtained in violation of the Constitutional rights of the petitioner.

i. The evidence without conflict shows that Bob White was arrested on August 11, 1937, between the hours of 9 and 10 a. m. near his home, in the field where he was working that day in Polk County, about two miles from Mrs. Ruby Cochran's home (R. 53; 89). Sheriff Holliday testified that he held Bob in jail there in Livingston six or seven days before he was taken to Beaumont, and that he did not file a charge against Bob or any of the other fifteen or sixteen Negroes he was holding for observation (R. 58). H. R. Appling testified that the first time he saw Bob White was on August 18, 1937, in Beaumont (R. 33), and Ernest Coker, County Attorney of Polk County, Texas, during that time, stated that he saw Bob White on the same date in Beaumont where he admitted typing the "statement" (R. 34).

The evidence of the State shows that Bob White was held in jail at least 7 days before he was taken to Beaumont.

ii. Coleman Weeks, a peace officer of Livingston testified that he saw Bob White during August, 1937, after he was

arrested for rape of Mrs. Ruby Cochran; and he was pointed out in court by Bob White as one of the officers who took him out of jail in Livingston and whipped and beat him (R. 93), admitted that he took him out of jail there but he did not know how many times and that he accompanied the Rangers when they took him out (R. 128).

iii. E. M. Davenport, testified that he was State Ranger and was sent to Livingston in August, by Captain Purvis, and during the six, seven or eight days he was there he had occasion to see and talk to Bob White. He refused to deny that Bob White was taken out of the jail while at Livingston and taken out on the road and taken out in the woods. "It would be hard to say. If Mr. Williamson testified to that, I could not say he was wrong" (R. 127-128).

iv. M. M. Williamson stated that he was a State Ranger, and had been one since 1935, and that he came to Polk County in August, 1937, under orders from Captain Purvis to assist the sheriff's department in the investigation of the assault on Mrs. Cochran, that he arrived on the afternoon of August 11th. He admitted testifying in the first trial of this case in Livingston, where on the witness stand under oath he stated that "I don't know exactly the number of times that I took this negro out from the jail during the time he was confined in jail, because I took him out so many times". That he further testified at Livingston that "I would take them out on the road. I would drive out off the road with them" (R. 125-126). In giving his reason for taking petitioner out of jail, he said he did so because the jail was crowded and he wanted to talk to him. "There were lots of them in there and we took them out where we would be by ourselves to talk to him" (R. 126).

v. The testimony of Sheriff Holliday directly contradicts the testimony of Ranger Williamson on the necessity

of taking Bob White out of jail there in Livingston to talk to him, as he states that during the time he held him in jail there, he had occasion to observe him for several days, that he would not eat, so "I placed him in jail to himself. I kept watching him and talking to him." That he talked with him "about an hour and a half before he carried him to Beaumont" (R. 54). On cross-examination he could not recall the Texas Rangers taking Bob White from jail. "They could have taken him from jail if they had wanted to". (R. 58).

v. As already shown the State's evidence shows that Bob White was carried to Beaumont on August 18, 1939, by Sheriff Holliday. Mr. Z. L. (Zimmie) Foreman, the private prosecutor who assisted the State in both trials, also appeared as a witness for the State at the trial in the Montgomery County District Court. He stated that he left Livingston for Beaumont around twelve o'clock that night and in company with Mr. Ernest Cochran, County Attorney of Livingston County, and arrived there somewhere around two o'clock that night. That they found Bob White upstairs in the Beaumont jail with Mr. R. D. Holliday (sheriff), Roy Young, and Ranger Jameson, Mr. Appling and Mr. Crocker, and others. That he was sure Rangers Williamson and Davenport, were in and out of the room while Bob White was there. This witness stated that he was sure that the Rangers, Mr. Ernest Coker, and Mr. Holliday knew that they came there for the purpose of getting the statement from Bob White. This witness did not deny that it took from two o'clock in the morning until daylight to get the statement. That they fooled around there, waiting to go up and get somebody down there that was not involved in it and that knew nothing about it to witness the statement (R. 115-121). Herman Crocker, the person whose name appears on the statement as a witness, stated that he saw Bob White in the Beaumont jail on

August 18th, 1937, and that upon being questioned about making a statement, broke down and began crying and said "yes" (R. 123). Ranger Davenport stated that when he reached Beaumont between eleven and twelve o'clock, he found Sheriff Holliday there with Bob. That Ranger Williamson also was there, and that they saw Mr. Foreman talking to the prisoner, also Mr. Coker. He stated that when he left Beaumont jail, it was about three or three-thirty and Bob was still up then and that he had no idea when he was released from the men who were there interrogating him (R. 126-127). Williamson also testified that he left Bob White in the Beaumont jail around about 3:30 that morning (R. 126).

Bob White testified that he was taken to Beaumont while handcuffed and when it came time to take the handcuffs off the Ranger had lost the key to the handcuffs in the woods, and Mr. Willie was phoned to bring a key to get them off (R. 90-91). He also testified that he did not know what day of the week he was carried to Beaumont nor what day of the week he was brought back (R. 91). He also stated that the three officers he had identified (Williamson, Davenport and Weeks) carried shot guns and rifles with them on all the occasions, and that these three went with him to Beaumont (R. 93). This testimony was not denied by Mr. Weeks (R. 128). He testified that "I was in fear of my life or serious bodily injury," that he had recently been injured, at Beaumont. "I was in fear of my life or serious bodily injury when the case was tried before" (R. 115).

b.

This Court has correctly determined that the petitioner's motion for rehearing and petition for writ of certiorari and the record discloses that the use of the confession extorted by violence, torture, personal abuse, duress and threats of death from the petitioner by the agents and

officers of the State of Texas, while acting in their official capacities, in the proceedings of the Trial Court which ended in the conviction and sentence of death upon the petitioner, is a denial of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(1) The claim of constitutional rights was duly and seasonably asserted in the Trial Court below when the State sought the permission of the said court to put the alleged confession of Bob White in evidence, at which time the petitioner duly objected, asserting in substance:

> That the confession was made under duress, and was obtained by coercion, cruelty, and threats of death by State officers; that it was not free and voluntary and was obtained while the defendant was under illegal restraint and after a week of physical and mental coercion; that at the time he was suffering from assaults previously made and for at least a week immediately prior thereto made by officers in the woods, where defendant was carried so many times that the officers had lost tract of the same, all for the purpose of making the defendant confess; that he was not permitted to have access to or consult counsel in his behalf, and finally that this defendant was denied every right that he was entitled to under the Constitution of Texas and the Constitution of the United States (R. 29-32).

These objections and others made thereto were duly considered by the Trial Court, and were duly overruled, the petitioner reserved his exceptions in Bill of Exception No. 3, which appears in the record on pages 29 to 32. By this action the Trial Court permitted the State to put the alleged confession into evidence, which was duly considered by the jury. [For Texas practice, see Code of Criminal Procedure of Texas (1925), Art. 667.] The Trial Court again passed upon the claim of violation of the Federal rights of the petitioner here urged in the ruling denying a

new trial after the conviction of the petitioner, on the Amended Motion for New Trial (R. 17) by its order overruling same (R. 25).

(2) The Federal questions thus properly and timely asserted in the Trial Court and there properly reserved were again submitted to the Court of Criminal Appeals of the State of Texas, the highest court in criminal cases of this kind in which an opinion can be had, which that court duly considered and ruled adversely against this petitioner, as will more fully appear from the opinion of the court (R. 132). The same now appears reported in 128 S. W. (2d) 51, *et seq.* This judgment became final as to the State courts when the petitioner's motion for rehearing was denied (R. 141). The judgment of the Court of Criminal Appeals on the Federal questions there urged and determined adversely were held by this Court to be in conflict with the applicable decisions of this Court on the same questions urged in *Chambers* v. *Florida*, No. 195, decided February 12, 1940, and *Canty* v. *Alabama*, No. 634, decided March 11, 1940, and on the basis of these decisions granted petitioner's petition for writ of certiorari and reversed the judgment of the Court of Criminal Appeals.

ARGUMENT.

The conviction and sentence of death of the petitioner in the State Court in which the use of the confession of the petitioner, by the State in its proceedings, which was obtained by the State by compulsion, constitutes a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The State of Texas in its Petition for Rehearing by its counsel recognizes and construes the order and citations of this Court of March 25, 1940 as sustaining the peti-

tioner's contention that the confession so introduced and used against him was obtained in violation of, and constituted a denial of, due process under the Fourteenth Amendment to the Constitution of the United States (*id.* p. 4). Petitioner thinks that is a fair deduction of the Court's action, and he further urges that the record in this cause clearly supports the decision rendered by this Court.

However, the respondent contends that the record in this case raises the following questions and issues which this Court has granted permission to be heard, to wit:

First: Whether the record reflects that the decision of, and disposition made of this cause by, the Court of Criminal Appeals of Texas was based or founded upon any substantial Federal question as distinguished from an adequate State question. (4) e.

Secondly: Whether the record reflects that in the Court of Criminal Appeals of Texas, in the submission and determination of this cause, there was drawn in question the validity of a statute of the State of Texas as being repugnant to the Constitution or Laws of the United States, and the decision of that court was in favor of the validity of the statute. (4) f.

Thirdly: Whether the record sustains, as a matter of fact, the conclusion of this Court that the petitioner's confession was obtained in violation of any provision of the Constitution or Laws of the United States. (4) g.

Fourthly: Whether the record reflects facts which bring this case within the rule announced by this Court in the case of Chambers *v.* Florida, 195, decided Februare 12, 1940. (4) h.

Fifthly: Whether a confession made in conformity with the laws and applicable statutes of the State of Texas, governing the making and taking of confessions, and thereafter used by the prosecution upon the trial

of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or any other provision thereof. (4) j. (See Respondent's Petition for Rehearing, pp. 6-8.)

First, the petitioner contends that the record sustains, as a matter of fact, the conclusion of this Court that the petitioner's confession was obtained in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, and the facts of this case are within the rule announced in *Chambers* v. *Florida*, 195, *supra*.

The State's evidence clearly shows through its own witnesses that the confession was illegally obtained and improperly introduced as evidence against the petitioner. Mrs. Ruby Cochran testified that the assault took place at home, out in the country, west of Livingston on the night of August 10th, 1937, which was sometime after she had retired that Tuesday night (R. 71-77). Bob White was taken into custody according to R. D. Holliday, sheriff, on the morning after the alleged assault, August 11th, 1937, which was about nine or ten o'clock that morning (R. 53) at which time he arrested him, and that during this time he made about fifteen or sixteen arrests of Negroes (R. 54) and he charged all of them with the same offense he charged Bob White, but "I did not file a complaint against any of them," (R. 58). He also stated that he held the petitioner six or seven days before he was taken to Beaumont. H. R. Appling, Ernest Coker, "Zimmie" Foreman, private prosecutor aiding the State, Herman Crocker, all (R. 33-124) testified that each of them saw Bob White in Beaumont jail on the night of August 18, 1937, where they had gone to get the confession introduced by the State (R. 35) from Bob White, which bears

the date of August 19th A. D. 1937 (R. 35). Holliday also testified that while he held Bob White in the jail there at Livingston, he separated him from the others so that he could better observe and talk to him, and that he kept "watching and talking to him" (R. 54). Ranger Williamson testified that he took Bob White out of the jail and out on the road and then he "drive" off the road so many times that he could not remember the number. That he did this in order to talk to him alone as the jail was so crowded he could not talk him there (R. 125-126); but the testimony of Sheriff Holliday shows that he kept Bob White alone in the jail and watched and kept talking to him (R. 54). Ranger Davenport did not deny taking Bob White out of jail into the woods, giving as his only reason that it was necessary in order to talk to him (R. 126-127). Coleman Weeks, a peace officer, admitted that he was with the Rangers nearly every time they took Bob White out of the jail, but he did not know how many times (R. 128).

Williamson, Davenport and Weeks, were the officers identified by Bob White as the persons who had removed him from the Livingston jail, at night during the time he was confined there and "they would take him the woods somewhere" he did not know, and this occurred Thursday night after the day he was arrested, and several nights in a row (R. 89); and each time they would whip him with what he supposed to be a piece of hose made of rubber, and every time he was carried back he was admonished not to talk about it nor tell what they had been doing to him. He also testified that they would talk to him out in the woods, and he was kept handcuffed all during the times he was out (R. 88-90). Bob White testified that he could not read or write as he went to school "mighty little", nor could he sign his own name. He also stated that these officers who carried him out were always heavily armed (R. 93).

It appears from the record that after this ordeal in Livingston was over, Bob was carried to Beaumont on the night of the 18th of August, 1937, as Foreman the private prosecutor aiding the State testified that he knew that Bob was being carried to Beaumont jail to get the confession, also Holliday, and the Rangers and others knew it. He also stated that he left Livingstone about 12 o'clock the night of the 18th of August and arrived in Beaumont about two or three a. m. and that he found Bob White, dressed and up, there with Holliday, Roy Young (who did not testify), Ranger Jameson (who did not testify), Rangers Davenport, Williamson, Coleman Weeks, Ernest Coker, County Attorney of Polk County, and others (R. 115-119). This witness stated that after they obtained the "statement" from Bob they waited up around there, waiting to go "get somebody down there that was not involved in it and that knew nothing about it to witness the statement," and in the meantime he went out to get some coffee a time or two (R. 120). Weeks for the State stated that when he got to Beaumont that night about eleven or twelve o'clock, Holliday was already there, and that Mr. Coker and Mr. Foreman were talking to the petitioner, that he imagined he left Beaumont that morning about three-thirty, and at that time Bob was still up, and that he had no idea when he was released from the men interrogating him (R. 127). Ranger Williamson also stated that when he reached Beaumont he found Holliday there and that he and Davenport went there together and he left around 3:30 that morning, which he stated was before the "statement" was written. That during the time he was there he and other Rangers walked in and out while Bob was being questioned (R. 124-126). Davenport was practically to same effect (R. 126-128). Bob White testified that he did not tell Mr. Coker what to write in that statement at Beau-

mont, that he was in fear of his life or serious bodily injury. "I had recently been injured, at Beaumont. I was in fear of my life or serious bodily injury when the case was tried before (R. 115). He stated that while he was in Beaumont one of the Rangers kicked him as he fell asleep, compelling him to stay awake (R. 96).

Mr. Zimmie Foreman admitted on cross-examination that at the trial in Livingston Bob White testified that "the Rangers told me that everybody in the bottom laid it on me; and that I might as well own up to it; and that if I didn't own up to it they would kill me". Also he admitted the same witness there testified that "I have some signs on my arms yet from that whipping." "I will pull up my sleeves and show you". (R. 121.)

Herman Crocker for the State testified that after he got to the Beaumont jail on the eighth floor where Bob White was, at the time Mr. Coker started typing the statement, he saw Bob with tears falling down his cheeks, and he was asked three or four times before they started typing. (R. 123-124.)

At the first trial which occurred in Livingston County, before the same judge who tried the case in Montgomery County, the Court of Criminal Appeals in reversing the judgment, where it was shown that one of the prosecuting attorneys in his argument to jury to convict Bob White stated:

> "Look at this court room; it is crowded with Polk County people demanding the death penalty for Bob White."

The court in passing on this statement, held that the argument was undoubtedly prejudicial in its nature, and stated that the law in situations like the present one was aptly stated in the case of *Gazley* v. *State*, 17 Tex. App. 267, where it was said:

"In cases like this, in which there is always excitement and feeling in the minds of the community where it occurs, and where the trial of the accused party takes place, as in this case it did, soon after the supposed crime, it requires but a trivial matter indeed to prejudice the case of the accused. This fact is well known to all who have had experience in criminal trials."

White v. *State*, 117, S. W. 2d. 450, 452, 453.

The indictment was not obtained until after the State had secured the alleged confession from Bob White in Beaumont on August 19, 1937 (R. 35). The date of the indictment being August 23, 1937. (R. 1-2.) The State's evidence shows that the petitioner was held in illegal custody from August 11, to August 23, 1937, a period of eleven days or more.

Petitioner therefore concludes that the record sustains this Court in holding that the confession was obtained in violation of the due process of law in the Fourteenth Amendment to the Constitution of the United States, and the record reflects facts which bring this case within the rule announced by this Court in *Chambers* v. *Florida, supra.*

2.

Secondly, the petitioner contends that the record shows the decision and disposition of this cause by the Court of Criminal Appeals of Texas was based upon or founded upon a substantial Federal question as distinguished from an adequate State question.

The record in this case shows that at the time the State offered in evidence the purported statement of Bob White (R. 29-32) the counsel for him in the trial court before Judge Browder objected to its admission on thirteen grounds in which were raised grave constitutional questions tending to show that the alleged statement was not volun-

tary, was obtained by duress, torture and brutality of the State officers, and while the petitioner was held in illegal custody and in violation of every right he was entitled to under the Constitution of Texas and the Constitution of the United States. These contentions were overruled by the trial court, and the alleged statement or confession was admitted in evidence and read to the jury. The evidence supporting the contentions of the petitioner, and that offered by the State was submitted to the jury, and they were left to determine whether the purported confession was obtained by illegal or improper means prescribed by the Federal Constitution, under instructions of the trial court. (R. 13). The jury duly considered this and rendered the verdict finding the petitioner guilty as charged in the indictment and assessed his penalty at death (R. 17). This verdict was approved by the trial court and judgment in accordance therewith was rendered by the court. (R. 16.)

The petitioner alleged the admission of and consideration by jury of the alleged confession was error and again alleged the grounds set forth in his objections tendered at the time the State sought to put the matter in evidence (R. 29-32) which raised grave questions under the Federal Constitution. (R. 17.) The motion for the new trial was overruled, and on appeal the Court of Criminal Appeals affirmed the judgment of the trial court, after duly considering all of the issues raised in the trial court as shown by the petitioner's bill of exceptions and the entire evidence on the matter tendered in the lower court (R. 135). This judgment became final on the overruling of the petitioner's motion for rehearing (R. 141).

The judgment of the Criminal Court of Appeals on the grave Federal questions of violation of constitutional rights of the petitioner, were found to be at variance to the applicable decisions of this Court, and on this ground the writ

was granted and the judgment reversed, this Court citing, *Chambers* v. *Florida, supra,* and *Canty* v. *Alabama, supra.* Other decisions in support thereof are:

Brown v. *Mississippi,* 297 U. S. 278,
Moore v. *Dempsey,* 261 U. S. 86.
Abston v. *State,* 102 S. W. 2d. 428 (Texas),
Blackshear v. *State,* 95 S. W. 2d. 960 (Texas),
State v. *Miller,* 61 Wash. 125, 111 P. 1053.
Rounds v. *State,* (Tenn.) 106 S. W. 2d. 212.

3.

Thirdly, the Respondent contends or raises the question in its Petition for Rehearing, paragraph 4, section f, whether the record reflects that in the Court of Criminal Appeals in the submission and determination of this cause, there was drawn in question the validity of a state statute of Texas as being repugnant to the Constitution or Laws of the United States, and the decision of that court was in favor of the validity of the statute.

This contention only goes to the method by which the alleged violation of due process of law under the Federal Constitution was raised in the State courts. The record before this Court answers that query of the State, as the petitioner contended below that the use of the purported confession in the criminal trial proceedings not only violated the Federal Constitution but also the applicable provisions of the Constitution of Texas, (R. 30) and the decision of the Court of Criminal Appeals (R. 141) was reached without the necessity of quoting any Texas State statutes or constitutional provisions of the Texas and construing the same. Neither was any statute of Texas there challenged as being contrary to the Federal Constitution.

Chambers v. *Florida*, No. 195, decided Feb. 12, 1940;
Blackshear v. *State* (Texas), 95 S. W. 2d. 960;
Rounds v. *State* (Tenn.), 106 S. W. 2d. 212.

4.

Fourthly, the respondent contends or raises the question in its petition for rehearing, 4. j., whether a confession made in conformity with the laws and applicable statutes of Texas governing the making and taking of confessions, and thereafter used by the State upon the trial of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The respondent in the phrasing of this question assumes the alleged confession was made in conformity with the applicable laws and statutes of Texas, and then on that assumption seeks to raise the question of due process of law under the Federal Constitution, particularly the Fourteenth Amendment.

The petitioner contends that the record shows the alleged confession used by the State at the trial, over his objections timely and properly made raising grave questions of due process of law under the Federal Constitution, violated not only the applicable provisions of the Federal Constitution but also the applicable State statutes and laws governing the taking and making of confessions in criminal cases.

The applicable statutes governing a case of this kind are set forth and properly applied by the Court of Criminal Appeals of Texas, in *Abston* v. *State*, 102 S. W. 2d. 428, decided January 27, 1937, with rehearing denied March 17, 1937.

Petitioner contends in the present case the Court of Criminal Appeals of Texas, in disposing of the case on this issue

did so without construing or setting forth any applicable statutes, by holding, in effect, that not only the alleged confession, as duly challenged, did not violate any statutes of Texas or the Constitution of Texas, but did not violate the due process clause of the Fourteenth Amendment to the Federal Constitution, which holding on the Federal question was found by this Court to be directly in conflict with the applicable provisions of Federal Constitution and this Court's decisions construing the same, as declared by this Court in *Chambers* v. *Florida*, 195, *supra*, and *Canty* v. *Alabama*, No. 654, *supra*. Compare also, *Blackshear* v. *State* (Texas), 95 S. W. 2d. 960.

Conclusion.

The petitioner submits that the Court has correctly determined the Constitutional questions raised by the record and proceedings in this Court and declared on March 25, 1940, by granting all the relief this petitioner asked for, and issuing the writ of certiorari to the Court of Criminal Appeals, reversing the judgment of that court, and that this Court should not reverse the decision rendered on March 25, 1940, and should refuse the petition for rehearing filed by the State herein.

The equal protection and due process of law under the Constitution are the Magna Carta of individual freedom from oppressive procedures used by those acting under State power, and approval, who misuse these powers and privileges to abuse the weak. Force, injustice and cruelty should not be the instruments of those in authority charged with the enforcement of the criminal law, and by such illegal means condemn the accused and take his liberty and life away from him, as was done in those times in human history, when malice, witchcraft and superstition darkened the minds of men. This Court is the last resort of the poor

and weak, where refuge may be found beneath the shield of this Constitution, and find protection from those who seek to take life without due process of law.

Respectfully submitted,

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(7927)

No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

BOB WHITE,
Appellant,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS

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No. 87

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APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PRELIMINARY STATEMENT

1.

Petitioner, Bob White, a negro, was convicted in the District Court of Polk County, Texas, of the capital offense of rape by assault upon Mrs. Ruby Coch-

ran, a white woman, which conviction was reversed and remanded by the Texas Court of Criminal Appeals. (117 S. W. (2d) 450.) Upon petitioner's application for change of venue, the cause was transferred to Montgomery County, Texas. Petitioner was again convicted in the District Court of Montgomery County, Texas, of said offense and given the death penalty, which conviction was affirmed by the Texas Court of Criminal Appeals. (128 S. W. (2d) 51.)

Petitioner filed in this honorable court his petition for writ of certiorari, to review the judgment of the Texas Court of Criminal Appeals, which was on October 13, 1939, dismissed by this court. Petitioner filed his petition for rehearing and on March 25, 1940, this court reversed the judgment of the trial court. The State of Texas filed its petition for rehearing in this court, and on April 22, 1940, this court entered the following order in this cause:

> "This cause is set for May 20, 1940, in order to afford to the State of Texas the opportunity to present its contentions upon the questions set forth in subdivisions (e), (f), (g), (h) and (j) of paragraph 4 of its petition for rehearing. The case will be heard on briefs and oral argument, or on briefs alone if that is desired, briefs to be filed and served on or before the date above mentioned."

The questions set forth in subdivisions (e), (f), (g), (h) and (j) of paragraph 4 of the state's petition for rehearing are as follows:

> "(e) Whether the record reflects that the deci-

sion of, and the disposition made of this cause was based or founded upon any substantial federal question as distinguished from an adequate state question.

"(f) Whether the record reflects that in the Court of Criminal Appeals of Texas, in the submission and determination of this cause, there was drawn in question the validity of a statute of the state of Texas as being repugnant to the constitution or laws of the United States, and the decision of that court was in favor of the validity of the statute.

"(g) Whether the record sustains, as a matter of fact, the conclusion of this court that the petitioner's confession was obtained in violation of any provision of the constitution or laws of the United States.

"(h) Whether the record reflects facts which bring this case within the rule announced by this court in the case of Chambers vs. Florida, 195, decided February 11, 1940.

"(j) Whether a confession made in conformity with the laws and applicable statutes of the state of Texas, governing the making and taking of confessions, and thereafter used by the prosecution upon the trial of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or any other provision thereof."

2.

The pertinent facts in this cause and the holding of the Texas Court of Criminal Appeals are contained

in the opinion of said court (R. 139-141) as follows:

"The facts in this case show that Mrs. Ruby Cochran was the wife of W. S. Cochran, and that she was the mother of two little boys, one eleven and the other thirteen years old; that her husband was a farmer, and also had a store on his farm near his home. That on the night of the day charged in the indictment Mr. Cochran was absent from his home, and his wife was there alone, save for her two little boys. That after she had gotten the little boys to sleep downstairs she retired to a large room upstairs, and prepared for bed, removing all of her clothing and placing a nightgown on her body. That she had a pistol that she oftentimes took to bed with her when alone. That early in the night she heard some peculiar noises in the house which aroused her, but to which she paid no further attention other than to take her pistol in her hand and listen. Again she heard a noise and something caused her bed to shake. Her bed was near a window, with the shade up, and after she felt her bed shake she said, 'Joe, is that you?' Her little boys had sometimes been in the habit of coming into their mother's room when they awakened at night, and when she made this remark she thought it might have been her son, Joe, who had shaken her bed. Immediately some one leaped upon her on the bed and she began to struggle with him. She then jumped off the bed, screaming, and ran to the window and attempted to leap through it, and struck her head thereon, but on account of such window being screened, she was unable to get through the intruder grabbed her and pulled her back. She continued struggling with him, and grasped one of his hands and found an open knife therein, which was pulled

through her hand, cutting it. She then attempted to reason with this person, and told him, 'Don't you know what the Cochrans will do to you,' and he replied with an oath, 'I don't care what they do to me; I don't care what happens to me.' After having become exhausted in her struggle, the intruder threw her to the floor and ravished her, threatening to kill her, and holding his knife on her. This man satisfied his lust upon her body; she being in such a helpless condition, that after leaving her body on the floor and starting out of the room, he returned and placed his hand on her, and then immediately left. As soon as she had recovered, Mrs. Cochran gave the alarm to the neighbors, and her husband's brothers immediately, and she was taken into town to a hospital. Barefooted tracks were found near the house, and appellant in his confession corroborates the story of Mrs. Cochran in most of its details. He gave a description of the interior of the house, from its entry until he left the same; he tells of his progress through this house which he had never before entered, giving many details that could only have been known by observation; he tells of this conversation relative to what the Cochrans would do to him, as well as what he did to Mrs. Cochran at the scene. He also told of the incident of the knife, and her attempts to get away by leaping through the upstairs window; how he dragged her back, and of hearing something fall on the floor when she lost her pistol; he also told of returning and feeling her body to see whether she was dead, and then he described his barefooted flight from the house. He also told of an incident that happened on his trip to the house relative to passing a neighbor's home and hearing a little girl complaining to her father because of

the fact that a big dog had bitten the little girl's puppy, which incident found confirmation in the statement of both the little girl and her father, and which could only have been known to him by his having heard it, thus showing his proximity to the Cochran home on the night in question. His confession contained so many corroborative statements of Mrs. Cochran's testimony that it is abundantly convincing that he was bound to have been present at the time the crime was committed. Mrs. Cochran did not identify the appellant; there was no light burning at the time the crime was committed, but she does say that her assailant was barefooted; that he had a very offensive breath, and was undoubtedly a negro.

"The District Judge gave a comprehensive charge on the law of the case, and in an excess of caution embodied therein a charge of circumstantial evidence, and we think that he has accorded the appellant every right that he was entitled to under our laws and Constitution. We think that the facts unerringly point to the appellant as the assailant of this lady, and that they exclude every other reasonable hypothesis than his guilt. We think that under the facts the jury was justified in the assessment of the extreme penalty, and so believing this judgment is affirmed.

Graves, Judge"

The confession of Bob White on its face is in strict conformity to the provisions of the statutory law of the State of Texas. It contains the statutory warning and is witnessed by two disinterested parties. Each page of the confession is separately signed and witnessed. (R. 35-41.) See Article 727, Texas Code of Criminal Procedure.

Bob White was tried first in Polk County where the crime was committed and received the death penalty. On appeal, the case was reversed because of improper argument of counsel. (117 S. W. (2d) 450.) The second trial was in Montgomery County, same having been transferred there on a plea of venue, filed by the defendant, and resulted in a death penalty, which was affirmed by the Court of Criminal Appeals of Texas. (128 S. W. (2d) 51.)

As the State of Texas understands the only questions for this court to determine are those embraced in subdivisions (e), (f), (g), (h) and (j) of the State of Texas' petition for rehearing. Neither of these raise any question about the guilt of the defendant, or about his having obtained a fair and impartial trial, save and except those questions revolving around and involving the condition under which the confession of Bob White was obtained. The above subdivisions have been copied in the preceding pages of this brief.

MAIN ISSUE

The State of Texas believes the controlling question in this case may be stated as follows:

Under the facts in this case was the confession of Bob White voluntary and given in accordance with the laws and Constitution of the State of Texas and in accordance with the Constitution of the United States? Or put in different language was the confession extracted from Bob White by unfair, coer-

cive or in such illegal ways as to deprive him of his rights under the 14th Amendment to the Constitution of the United States?

STATEMENT, ARGUMENT AND AUTHORITIES

In order that the court may get the viewpoint of the State of Texas, we give the following summary of the testimony relative to how the confession was obtained and what was said by the parties.

A summary of the facts upon this issue may be stated as follows:

(a) Petitioner alone testified that violence was used by the officers.

(b) He was contradicted directly by witnesses for the prosecution upon this point who asserted no violence was used.

(c) Petitioner denied execution of or the making of the confession.

(d) As to this he was thoroughly contradicted, by evidence showing he not only signed by mark but gave the confession and upon a former trial of the case admitted having made the confession.

(e) Petitioner claimed that he was carried from the jail at Livingston on four consecutive nights and whipped by the rangers whom he did not know by name.

(f) The Rangers denied whipping him but admitted having taken petitioner out of jail for the purpose of talking to him.

In support of these statements, we give the following summary of the testimony relative to how the confession was obtained and what was said by the parties:

Bob White testified he was arrested Wednesday morning, that he was taken out of the jail Thursday night into the woods and whipped with a rubber hose and was kept out about one hour and a half (R-89-90). He testified he was taken out another night and whipped and was kept out about one half hour (R-90). He testified "they took me to Beaumont about three or four days after they got through with whipping me, they whipped me four nights" (R-90). He testified "I did not know what was in that statement (confession). At the time I signed it I never knowed. I never signed it. I ain't never signed it. I did not make a mark on it. I did not see any body hold the pen at the time the mark was made. That was on Saturday night and I remained over in Beaumont until Sunday evening. I don't know what day of the week it was I went down there. I don't know what day of the week it was when I was there." (R-91).

Bob White testified "I never did tell anyone that I did do that (Commit the crime). The reason I never did tell anyone that I did it was because I knew I didn't do it. I knew I was not guilty of the crime." (R-92).

Ernest Coker was the County Attorney who took the confession (R-34). Bob White testified "Ernest Coker never said a harsh word to me in his life. He has always treated me courteous, fair and right. These times that I claim that somebody carried me out somewhere down there and whipped me I don't tell anybody that Ernest Coker was with them. (R-94). Bob White testified "As to whether Mr. Appling, the druggist in Beaumont, was in there I don't know him. If he was the first man on the stand here I don't know him. He was not in there that I know of. He may have been in there but I didn't see him. He is not the man that read the statement over to me. Mr. Ernest Coker is the man that wrote it. I say that Mr. Appling did not read it to me. If he is the first man who went on the witness stand this morning I don't know him, if he was in there I didn't see him. (R-96-97). As to whether I saw another man there by the name of Crocker, there was so many there I didn't know one from another. I do not remember the man who gave me the pen that I made these crosses with. As to whether I made them with a fountain pen, I don't remember making them at all. I did not make that cross right there. I know I never touched it. I did not make that cross. I did not touch the pen while that cross was made. I did not see those two men sign their names on that front page. I never made this cross here on the next page and I did not touch the pen when it was made. I did not see those men sign their names there. On page 3 I did not touch the cross. I did not see those gentlemen sign their names there. On page 4 I did not make that X I did not see those gentlemen sign their names

there. On page 5 I did not make that cross I see where Mr. Appling's name is signed there. . . . I said I did not touch the pen when these crosses were made on these five pages of paper in Beaumont down there, which is witnessed by those gentlemen whom I never seen. I say I never done that. (R-97). Bob White testified "It is a fact that during that period of time (while the confession was being taken) that we are talking about you sent out and got coffee and I drank some. We went out and got some water when you and I went back to get a drink of water you did not say an unkind word to me. You never have in your life." (R-98).

Z. L. Foreman testified that he went with Ernest Coker, the County Attorney at the time the statement was obtained from Bob White, that H. R. Appling and Herman Crocker and the Sheriff and some others were present at the time. That Mr. Coker, the County Attorney, gave Bob White a warning and read over to Bob White a statement "we had asked Bob White if there was anything wrong in the statement to correct it and right on down the line like you and I are sitting here talking to you. Ernest Coker used the typewriter. He was County Attorney of Polk County: I don't know who dictated that statement. I don't think it was dictated. Bob White told what happened and Mr. Ernest Coker here put it down." (R-116). Foreman further testified that on the former trial of the case at Livingston, Bob White testified "I went to Cochran's and bought some lard in 1936." He further testified that White on the former trial testified "I will tell you the truth about it

as well as I know. I made this little x mark on the statement. I was touching the pen. I touched the pen on page 2, I touched the pen on page 3, I touched the pen on page 4, I touched the pen on page 5, I made that little X mark." (R-117). Mr. Foreman further testified that on the previous trial at Livingston Bob White testified as follows: "I remember seeing Mr. Appling, the man who testified here today, that he was in Beaumont and that he read the statement over to me. I remember seeing him in Beaumont. He never said a cross word to me." (R-117). Mr. Foreman further testified that Bob White in the former trial testified as follows: "After I had made this statement Mr. Appling, the man who was a witness on the stand, took his time and read it over carefully and slowly to me." (R-117). Mr. Foreman further testified that Bob White on the former trial testified as follows: "Mr. Coker told me that I did not have to make any statement at all. Mr. Coker told me that any statement I did make could be used in evidence against me. Mr. Coker wrote the statement down." R-117). Mr Foreman further testified that Bob White on the former trial at Livingston testified as follows: "The Rangers did not make me say what I said in that statement. Mr. Coker did not make me say what I said in this statement. Mr. Foreman did not make me say what I said in this statement. Mr. Appling did not make me say what I said in this statement. Mr. Crocker did not make me say what I said in this statement. Nobody made me say what I said in this statement." (R-119).

Mr. Foreman further testified that when the con-

fession was obtained from Bob White at Beaumont "the statement was absolutely made in my presence from the beginning to the end. At the time he was there he (Bob White) rolled up his sleeves just as high as he could at my request. I was as close to him as I am to Mr. Graham (the Reporter) you might say closer, that is about three feet. I did not discover any scar or bruises or abrasions on his arms anywhere. If there were any there I did not see them. I never heard of it until the other trial. I saw his arms as high as he could roll his sleeves at that time. At that time he made no complaint with reference to it." (R-122).

Herman Crocker testified that he was a salesman from the Beaumont Motor Company and had never served as a peace officer, that on the night of August 18, 1937, he saw the defendant Bob White in the Beaumont jail for the first time. That he recalled Bob White having made a statement and he identified the one offered in evidence as the one that had been made. He testified "the County Attorney of Polk County wrote that statement out, that is the gentleman sitting back there. After the statement had been reduced to writing Bob White held this fountain pen here the top of it like that while the county attorney signed it and made his mark. This is the same fountain pen. Before Bob White signed this statement that I have in my hand it was read over to him two different times very close and carefully all the way through and was asked 'Is that right Bob?' All the way through. Mr. H. R. Appling, the other witness to the statement read it to him . . . He

was asked if he wanted to make a statement and he said yes and he broke down and commenced crying. Tears were running out of his eyes and he was asked if he felt better since he had broke down, and he was asked if he had made up his mind to make a confession and he said yes, and they went on then and started. The County Attorney started typing this then. This is the statement he made. Mr. Coker wrote it down as he said it. He was asked very carefully and every word repeated as high as three times on each one." (R-123).

M. W. Williamson testified that he was a State Ranger and had been since 1935, and assisted in investigating the crime in question in August 1937. He testified "I never at any time struck or beat or whipped the defendant Bob White. I did not at any time on the occasion of the investigation of the offense ever handcuff him around a tree and whip him. He was never whipped or beaten or mistreated at any time in my presence. (R-124). He further testified "I testified on the trial at Livingston (former trial) that 'I don't know exactly the number of times that I took this negro out from the jail during the time he was confined in jail because I took him out so many times.' I further testified at Livingston that 'I would take them out on the road, I would drive out off of the road with them.' It is my testimony now that no one at any time in my presence ever handcuffed Bob to a tree or whipped him. I did not threaten at any time as to what was going to happen to him if he didn't sign the statement. I didn't do that I did not know of that ever having been done." (R-

125). He further testified "we took him out of jail to talk to him. The jail was crowded. There was lots of them in there and we took him out where we could be by ourselves and talk to him." (R-126)

E. M. Davenport testified that he was a State Ranger and had been for about 3½ years, that he helped investigate the crime in question. He testified "at the time I was there, I had occasion to hear and talk to Bob White, the defendant, as to whether me or anyone else in my presence ever beat or whipped him or handcuffed him to a tree or kicked him, there never was any body kicked or whipped him either. I did not see anybody handcuff him to a tree and beat him" (R-127).

Coleman Weeks testified that he was a peace officer in 1937. He was asked this question: "Mr. Weeks you recall yesterday the defendant pointed you out as one who mistreated him while he was in jail? I will ask you to state to the jury whether or not at any time you whipped, beat or mistreated the defendant in any way? Ans. No sir I never have. No one in my presence whipped or mistreated the defendant in any way. I have no knowledge of any one whipping or mistreating the defendant during the time he was under arrest." (R-128).

From the above excerpts from the testimony which we believe fairly present the question, it occurs to us that there is very little similarity between the facts in the case at bar and the *Chambers* v. *Florida* case. In the Florida case, as revealed by the opinion of this

Court, the State put bloodhounds on the trail. A convict guard by the name of J. C. Williams took a prominent part in the investigation. The defendants were carried to an adjoining county because they feared mob violence. On the road from one jail to another the Sheriff told a speed cop that he was taking the negroes to the Miami jail to escape a mob. The defendant was kept in the death cell of the county jail from Sunday, May 14 to Saturday, May 20. Some thirty to forty negro suspects were subjected to questioning and cross-questioning from Saturday afternoon until sunrise of the next day, the defendants underwent persistent and repeated questioning and this was continued for several days, and all night before the confessions were secured, and were referred to as an "all night vigil." The defendants were kept under constant vigil for more than a week and under constant questioning by the officers. In the opinion by this court it is stated "The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after day light. Be that as it may it is certain that by Saturday, May 20, five days of continued questioning had elicited no confession, admittedly a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners principally the sheriff and Williams, the convict guard, began about three thirty that Saturday afternoon and from that hour on with only short intervals for food and rest for the questioners—they all stayed up all night. 'They bring one of them at the time

backward and forward . . until he confessed,' and Williams was present and participating that night during the whole of which the jail's cook served sandwiches and coffee to the men who grilled the prisoners.

"Sometime in the early hours of Sunday the 21st, probably about two thirty Woodward apparently broke as one of the State's witnesses put it—after a fifteen or twenty minutes period of questioning by Williams, the Sheriff and Constable one right after the other. The State's attorney was awakened at his home and called to the jail. He came and was dissatisfied with the confession of Woodward which he took down in writing at that time and said something like 'tear this paper up that isn't what I want. When you get something worth while call me.' This same State's attorney conducted the State's case in the Circuit court below and made himself a witness but did not testify as to why Woodward's first alleged confession was unsatisfactory to him."

The officers who were present in the Florida case at the time corroborated the statement that the District Attorney Maire said that the first confession was not sufficient and would not support a conviction and that they would have to get more out of the negro defendants than they had, and that after the District Attorney had made that statement to them the defendant was then put through some more grilling examninations and threats and then late in the night made another confession which was satisfactory to the District Attorney. The State refused to

produce the first confession and in fact destroyed it. The officers in the Florida case, corroborated the defendants in many ways.

In the case at bar Bob White, the defendant, himself on the first trial testified that he signed the statement; that he signed each page thereof; that Mr. Appling, one of the witnesses, read the statement over to him; that Mr. Coker, the County Attorney, warned him that the statement could be used against him; he testified on the first trial that Mr. Appling was present, and that neither the Rangers nor anyone else made him make the confession (Foreman testimony R 116-119).

On the last trial Bob White testified that Mr. Appling was not present at the time he made his confession; that Appling did not read it over to him. He testified that he did not even sign the confession and did not give the officers the information contained therein; he emphatically denied knowing about what was in the confession or having at any time signed or consented thereto or having made the cross marks for his signature (R-96-97).

On the last trial Bob White testified that the County Attorney, Mr. Coker, as well as the sheriff treated him kindly; that while the confession was being given he and the County Attorney had coffee together; that they went out to get a drink of water together and that not an unkind word was said to him by Mr. Coker who took down the confession. (R-96-7).

Each of the officers who took the defendant Bob White out of the jail or who talked to him and who was accused by Bob White of having whipped him or used any unfair means or methods took the stand and denied emphatically having used any such force, threat or intimidation. Mr. Appling, a druggist in the city of Beaumont, testified that he did not know the defendant or any of the parties prior to the commission of the crime. He was called in as a citizen to witness the confession and he testified positively that he read the statement over to Bob White and that Bob White understood the matter and was perfectly willing and apparently seemed glad to make the statement after he had decided to confess. (R-33). In contrast to this Bob White testified that he did not even know Mr. Appling and never saw him; that Appling was not present at the time the confession was made; that he (Appling) did not read it over to him. (R-96-97). However, in this connection it is well to note that Bob White in his first trial testified that Mr. Appling was present and that Mr. Appling did read it to him and explain the statement to him. (R-117).

These conflicting statements made by Bob White himself stating at the first trial that he did sign it, and then on the second trial that he did not sign it, and then stating that he was forced to sign it, and then denying the various things that he testified to on the first trial; and his testifying to an entirely different state of facts on the first trial and the last trial; and his not being corroborated by a single witness; and when he exhibited his body and

arms to the officer at the time the confession was made there was no indication that he had been ill treated or bruised or that he had been handcuffed to a tree, and brutally assaulted; shows that Bob White was not forced to make the confession by any unlawful, unjust or unjustifiable means.

The facts in this case are so different from those in the case of *Chambers* v. *Florida* and *Brown* v. *Mississippi* that we submit neither of those cases are decisive of, neither should they be considered as authority for reversing Bob White's case.

If the confession of Bob White under the record as revealed is not admissible then no confession could ever be used against any defendant. Most of the material statements made by him in his confession are corroborated and were proven to be true by following up the statements which he made in his confession. Bob White stated in the confession that he heard a child complaining about the big dog jumping on her little dog and this was corroborated by the child and her father. He stated that he took off his shoes at the gate and walked barefooted into the house, this statement was corroborated by the facts on the ground. He described the furniture in the house in a way that no one could have described it unless they had actually been there. He described the falling of the pistol on the floor which Mrs. Cochran, the woman, corroborated. He described her having run against the screen window trying to get out and could not because of the screen being fastened and that fact was corroborated by the

torn place in the screen. He testified that the brothers of Mrs. Cochran passed the house shortly after the crime and they testified to that fact. Practically every statement made in his confession that tended to show his guilt was traced down and proven to be true.

AUTHORITIES

Article 727, Vernon's Annotated Texas Code of Criminal Procedure, reads as follows:

> "The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

The case of *Wilson* v. *United States*, 162 U. S., page 613 et seq., 40 L. Ed, 1090 et seq., holds that where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that is is admissible, the question may be left to the jury, with the direction that they should reject it if, upon the whole evidence they are satisfied that it was not the voluntary act of the defendant. This case also holds that false statements made by an accused person, in explanation or defense, may be regarded by the jury as tending to show guilt.

The case of *Murphy* v. *United States*, 285 F., 801 et seq., holds that disputes between witnesses as to whether a confession is voluntary must, like other controverted issues, be left for the jury. This case further held that the defendant's claims before the trial court were inconsistent with the position he took in the appellate court, and that the confession was voluntary.

Volume 1, Ruling Case Law, Admissions and Declarations, Section 122, pages 577-579, inclusive, read as follows:

> "Voluntariness as Question of Law or Fact. —It is the province of the court and not of the jury to determine in the first instance whether or not a confession offered in evidence is voluntary, and this is done when it is offered in evidence. If the court decides that it is voluntary it receives the confession. If, on the other hand, it decides that the confession is not voluntary it rejects it, and that is the end of the matter un-

less some question of law is reserved. In many jurisdictions, however, where the evidence on the question of voluntariness is conflicting, or where the court is in doubt whether the confession was or was not voluntary, the whole matter may be left to the jury under instructions to disregard the confession unless they find that it was made voluntarily. After a confession has been admitted by the court, either party has a right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide the question of competency, and all other facts and circumstances relevant to the confession, or affecting its weight or credit as evidence; and if it should be made to appear at this point, or at any time during the progress of the trial, that the confession was made under such circumstances as to render it incompetent as evidence it should be excluded by the court. When the confession is admitted in evidence as competent and is not rejected by the court during the trial its weight and value as evidence are for the jury. It has been stated, however, that when a confession has been admitted in evidence by the court and there is conflicting evidence as to whether it was a voluntary confession the question of veluntariness should be left to the determination of the jury, like every other question of fact, under instructions to disregard wholly the evidence of the confession unless they are convinced and find, upon all the evidence adduced, that it was voluntary."

Volume 1, Ruling Case Law, page 584, reads in part, as follows:

"Where a prima facie case by the prosecution

warrants the court in admitting the confession in evidence the mere fact that the defendant testifies that he made his confession through fear and under duress is not, of itself sufficient to overcome the prima facie case and the testimony of the officer to whom the confession was made that it was made voluntarily. So confessions of a person accused of crime cannot be excluded merely because he testifies that they were obtained by duress or by promise of immunity, where his testimony on this subject is contradicted by that of other witnesses. THE DETERMINATION OF THE TRIAL COURT THAT A CONFESSION OFFERED IN EVIDENCE WAS VOLUNTARY WILL NOT BE INTERFERED WITH ON APPEAL UNLESS THERE IS CLEAR ERROR." (Capitals ours.)

The case of *Allen, et al* v. *United States, Circuit Court of Appeals, 7th Circuit*, 4 F. (2d) 688, holds that the Federal Appellate Court will not determine the weight of conflicting evidence and that the weight of the evidence and the credibility of witnesses are for the jury to determine. We quote from the court's opinion as follows:

"Before discussing the evidence, it may be well to set out that the rule laid down in Applebaum v. United States (C. C. A.) 274 F. 43, and frequently followed by this court (Holy v. United States, 278 F. 521; Grossman v. U. S., 282 F. 790-793; Wolf v. U. S., 283 F. 885, 888; Talbot v. U. S., 286 F. 21; Ink v. United States, 290 F. 203), must govern us in determining whether there is present a jury question. It is of no avail for counsel to cite cases which

have attempted to draw a distinction between 'evidence' and 'substantial evidence,' or to point out to an occasional decision where the appellate court weighed the evidence and reviewed the decision of the jury, upon a disputed issue of fact, for such is not the rule in this jurisdiction. *The right of an accused to a trial by jury upon all issues of fact is guaranteed by the Fifth Amendment to the Constitution. But the accused cannot have both a trial by a jury, and a retrial by an appellate court. If the evidence be conflicting, then the issue is one for the jury, and no asserted distinction between 'evidence' and 'substantial evidence' can afford a basis for a modification of this rule.*" (Italics ours.)

The case of *Jabczynski* v. *U. S.*, 53 F. (2d) 1014, certiorari denied, 52 S. Ct. 285, U. S., 546, 76 L. Ed. 937, holds that because a variance exists between government and defendant's testimony it does not necessarily mean that defendants are right and government's witnesses are in error.

The case of Burton v. U. S., 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, holds that if there is sufficient evidence to go to the jury in a criminal case, the Supreme Court of the United States will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of evidence, but will limit its decision to questions of law.

The case of Coltabellotta v. U. S., 45 F. (2d) 117, holds that the jury may disbelieve defendant's testimony and take facts disclosed by government's evidence as true.

The case of People v. Freer, 285, P. 386, 104 Cal. App. 39, holds that the jury could reject entire statement of defendant or any part thereof.

The case of Commonwealth v. McCarty, 172 N. E. 97, 272 Mass. 107, holds that the jury may consider defendant's false testimony as evidence of guilt.

The case of Metz v. State, 74 S. W. (2d) 1025 127 Tex. Cr. R. 126, holds that the jurors were not bound to believe testimony of accused, since accused was an interested witness.

The case of Cross v. State, 129 Tex. Cr. R. 526, 89 S. W. (2d) 217, holds that where testimony raises issue as to whether confession is voluntary and matter is submitted to jury, its finding is conclusive.

The case of Black v. State, 128 SW (2d) 406, holds that where defendant claimed alleged confession was not voluntary, submission to jury of questions where the necessary statutory warning had been given to defendant prior to time he made confession and where the confession was voluntarily made was all that the defendant was entitled to.

The case of Seals v. State, 73 S. W. (2d) 528, holds that a confession in robbery prosecution was properly admitted, notwithstanding accused claimed that he made confession to get out of dark cell where officer taking confession testified that confession was freely and voluntarily made.

The case of Carr v. State, 24 Tex. App. 562, 7 S. W. 328, holds that where the confession states that in committing burglary the defendant acted under the compulsion of another person, and is contradicted by that person himself, the jury must determine the credibility and weight of the evidence, and in doing so they may believe one portion of the confession, and reject as untrue another portion contradicted by evidence produced.

The case of Rios v. State, 7 S. W. (2d) 535, holds that a confession is admissible if the accused in connection therewith makes statement found to be true which conduces to established guilt.

The case of Kincaid v. State, 131 Tex. Cr. R. 101, 97 S. W. (2d) 175, holds that in an incest prosecution, the denial of accused on witness stand that woman was his niece and later admission by him that she was, and a denial that he knew instrument he signed was confession though competent witnesses stated that defendant made confession after being fully warned, and that details of the confession were his own, confession was held admissible and voluntary.

The case of *Brown* v. *Mississippi* (297 U. S. 278), is clearly distinguishable. In that case the officers admitted using force and compulsion and the same was clearly proven and not denied.

The case of *Chambers* v. *Florida*, is also clearly distinguishable. In the *Chambers* v. *Florida* case, petitioner was subjected to long, protracted, continuous, ceaseless questioning without food and rest by relays of questioners who questioned petitioners

until they became tired. This was admitted by all parties and was undisputed evidence in that case. It was also the undisputed evidence in that case that about three-thirty one Saturday afternoon the sheriff and convict guard and a crowd of officers and citizens began to question the defendant and from that hour on, with only short intervals of rest and food, for the questioners, and not for the defendant, the questioners conducted an all night vigil until about two-thirty A. M. when the said defendant gave one confession which was not satisfactory to the State's attorney who instructed the sheriff to get 'something worth while' in the nature of a confession, and call him when they got it and that just before sunrise the sheriff got his confession from the defendant more 'worth while'. The confession was only corroborated by the confessions of three other confessors.

In the case at bar there is no evidence in the record showing the type and kind of questioning as shown in the *Chambers* v. *Florida case;* there is no evidence on record in this case that the defendant was deprived of sleep; there is no evidence in this record that the defendant, Bob White, was deprived of food; there is no evidence whatsoever in this record that the officers in any way exceeded the due bounds of propriety in questioning the said Bob White. The petitioner, Bob White, does not in his testimony any where say or swear that the officers or rangers or attorneys harrassed or ceaselessly questioned him, caused him to lose sleep, and kept him from food, to such an extent that they broke

down his resistance and that he therefore executed the confession. That is not the theory of the defendant nor his counsel. It will be specifically remembered that the petitioner, Bob White, has steadfastly denied in his trial that he ever executed the confession at all.

It seems inconceivable that the defendant should contend before this honorable court that a confession by force or a confession by repeated questioning, without rest or food, through a long night's vigil, was extorted from him by the officers, especially in view of the fact that he swore positively that he did not sign the confession. He swore that he did not sign the confession in the face of the evidence of the county attorney of the county, Mr. Foreman, the former county attorney, Mr. Appling, a druggist, and a disinterested witness, Mr. Crocker, an automobile salesman, and a disinterested witness, and other persons. Surely, the jury, after hearing the evidence of Bob White, and after hearing the evidence of the state's witnesses, and after observing all of said witnesses and their conduct and demeanor upon the witness stand, had a right to disbelieve the testimony of Bob White, and they did disbelieve such testimony.

It is fundamental law that the jury is the judge of the credibility of the witnesses and of the weight to be given their testimony. The reason for this rule is obvious; the jury can observe the conduct and demeanor of the witnesses upon the witness stand. Appellate Courts cannot pass upon the credi-

bility of witnesses and the weight to be given their testimony because of their lack of actual observation of the witnesses upon the witness stand.

A defendant in a criminal case is an interested witness and the jury is not required to believe his testimony. The jury in this case did not believe Bob White's testimony that the officers whipped, mistreated and threatened him. They had a right to disbelieve his testimony. The jury had a right to believe the testimony of the officers that they did not whip, mistreat or threaten petitioner, that they carried him out of jail to talk to him because of the crowded condition of the jail, and that the confession was in all things voluntary as proven by a large number of reliable witnesses.

Certainly, this honorable court cannot say, in the face of this record, and in the absence of any testimony similar to that in the Chambers case, that the defendant, Bob White, signed a confession because of long, protracted, repeated, all-night questioning, without food or rest, especially since the defendant himself did not swear to any of those things, and especially denied that he even signed and made his mark on the confession. This honorable court cannot guess and speculate upon the evidence.

We call attention to the fact that this case is before this court for a review of the judgment of the Court of Criminal Appeals of Texas, and as lending credit to the conclusion reached by that Court, as being in thorough accord with the ruling of this

Court in the case of *Brown* v. *Mississippi*. supra, we call attention to the case of *Abston* v. *State*, 102 S. W. (2d) 428 and 123 S. W. (2d) 902, which was written long before *Chamber* v. *Florida*, supra.

Expressions there contained and conclusions there reached demonstrate the complete harmony with and a perfect willingness on the part of the Court of Criminal Appeals of Texas to accept the views of this Court and lends weight to our contention here that this record does not reflect facts showing that the confession in the case was coerced or obtained in violation of any law.

CONCLUSION

The issue as to whether the confession was voluntary was fairly and adequately submitted to the jury by the learned trial judge under appropriate instructions of law. The jury, after observing the witnesses and hearing their testimony, found that the defendant's confession was voluntary in all respects, that the evidence was sufficient to convict the defendant, and by their verdict they have foreclosed the question as to defendant's guilt and the admissibility of this confession.

We respectfully submit that the facts in this case amply support the verdict of the jury and we pray that the State's petition for re-hearing be granted, the writ of certiorari be denied and that the judgment of the Court of Criminal Appeals of Texas be in all things affirmed.

J. P. Rogers, F. S. K. Whittaker, S. F. Hill and Carter Wesley, attorneys at law, of Houston, Texas, are of counsel for petitioner, and they have been furnished copies of this brief.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING.

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CARTER WESLEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

MOTION FOR REHEARING OUT OF RULE ON APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States of America:

Bob White, petitioner in the above numbered and entitled cause, shows by this motion to have the Honorable Court reconsider the petition of the appellant for writ of certiorari under the rules of the said court therefor filed with his motion to proceed in forma pauperis upon leave granted by said court, and permit this appellant to have this Court reconsider its action in denying the application for a writ of certiorari out of the rule required for motions for rehearing for the following reasons:

As shown by the appellant's petition, this is criminal case in which the said appellant, Bob White, was indicted in

the District Court of Polk County, Texas, and by change of venue granted upon the application for Bob White the same was removed to the District Court of Montgomery County, Texas, where he was tried, convicted and assessed the extreme penalty of death, for the alleged offense of rape as set forth in said indictment.

The case was duly appealed to the Court of Criminal Appeals of Texas, and which judgment was affirmed by said court on February 15, 1939, and after overruling of motion for rehearing on May 17, 1939, the said judgment of conviction became final, there being no further court to apply in said State, as this court being the highest court in the State from which a decision can be had in criminal cases of felony grade. The appellant then sought under motion for leave to proceed in forma pauperis, a writ for certiorari, which was denied on November 15, 1939, by this Honorable Supreme Court.

Your appellant, unless this Honorable Court hear and grant this motion out of rule for rehearing, will be executed by electrocution by the Warden of the State Penitentiary under the judgment of conviction as affirmed by the Court of Criminal Appeals of Texas.

In addition to the errors assigned in the original petition, which will not be restated, there are other errors in the proceedings in the State courts which raise substantial issues showing violations under the 14th Amendment, Section One of the Constitution of the United States by the State of Texas, as will be hereinafter set out.

This Honorable Court has jurisdiction, because at the trial thereof, Bob White seasonable made objections and reserved exceptions to the trial court admitting in evidence and allowing to go to the jury, which convicted him and assessed the death penalty, an alleged confession made by the appellant, and presented by the State. The appellant offered evidence to show that the said alleged confession

was made and signed by him, under circumstances and conditions proscribed by the Federal Constitution, under the equal protection of the laws and due process provisions in the 14th Amendment; and which Federal question the trial court passed upon and denied, and its judgment was affirmed in this particular by the Court of Criminal Appeals of Texas, the highest court in Texas, from which a decision thereon could be had. Which action is here affirmed as error and contrary to applicable decisions of this Honorable Court, where the confessions are obtained by brutal and inhuman methods proscribed by the due process clause of the Federal Constitution in the 14th amendment. The appellant, being a Negro man, accused of raping a white woman in Texas, where, as reflected by the record, the populace could hardly be restrained from doing the prisoner violence, where, as the record here discloses, to be accused of such crime, is sufficient for summary action at the hand of mobs; where in this case it became necessary for the Governor of Texas to send Texas Rangers to protect the prisoner, your appellant, and at least give him a semblance of a trial; where the State officers impelled more by demand of the mob to get a victim upon which it can exhibit its spleen, as shown by the record in this case; where this illiterate country farmer, arrested with others, and kept confined in Polk County jail, without advice of counsel for several days, and during which time he was taken out at night with other Negroes by the State officers and hung by his hands, naked and beaten until he fainted; then threatened with death if he disclosed his treatment and this process completed by threats of death, and intimations that they (State officers) would turn them over to the enraged citizens unless they confessed. Your appellant, with his shirt beaten off, was rushed through the country to Beaumont, Texas, to escape the alleged fury of a mob, where confined in said place in the jail, surrounded by the county

peace officers and Texas Rangers, the county attorney and a "private prosecutor", without access to counsel, under threats of violence was forced to sign a previously prepared "confession", all of which the record will reflect. With this "confession" the great State of Texas, convicted its weakest citizen in the face and fury of a mob, in a so-called trial under the common law.

This appellant here states to deny his writ would seem to lend encouragement to such practices of "third degree" methods especially in cases of the nature of which the appellant is accused, and make justice a mockery and so called trials a farce. The appellant prays that this Honorable Court will not permit any technical rules to bar it from rendering substantial justice.

II.

The appellant will further show this Honorable Court, that he was not given a fair trial, because of the intimidation of the large number of white people created by their menacing and threatening attitudes. All Negroes in the town of Livingston were afraid to come to town, as the whites were threatening mob violence. Some seventy-five deputies, together with State Rangers were necessary to guard the witnesses, counsel and the appellant. Thus due process of law and equal protection of the laws enjoined on the State of Texas by the 14th Amendment to the Federal Constitution were denied, which this record should reflect. The error of the State court in this regard should be reversed.

III.

The appellant urges this Court to review the entire record and former petition of the appellant, so that the State will not take away this Negro's life without due process of law.

WHEREFORE the appellant prays that his application for a writ of certiorari be allowed, and that the transcript of

the records, statement of facts, and all pertinent proceedings and papers upon which said decree was rendered, opinion based, and motion for rehearing, be duly authenticated and by order of this Honorable Court be sent by the Criminal Court of Appeals as such case made and provided in order that the same may be inspected and corrected in accordance with law and justice.

F. S. K. WHITTAKER.
J. P. ROGERS.

CARTER WESLEY,
Of Counsel.

Assignment of Errors.

Now comes Bob White, appellant in the above numbered and entitled cause and files the following additional assignments of error upon which he relies as additional reasons for the granting of his motion to reconsider rehearing out of rule in his application for writ of certiorari to the Court of Criminal Appeals of Texas, under the final decree of said court rendered on motion for rehearing rendered May 17, 1939.

3

The Court of Criminal Appeals erred in affirming the judgment of the trial court in overruling the appellant's objections made to the admission in evidence of the involuntary "confession" of the accused, secured by threats, violence and torture in violation of the due process clause and equal protection clause of the 14th Amendment to Federal Constitution, which rights were properly and reserved, and erroneously decided by the trial court and the Court of Criminal Appeals.

4

The Court of Criminal Appeals erred in affirming the judgment of the trial court inflicting the death penalty on

the appellant, as the circumstances and conditions under which the trial was had, in the face of an intimidating mob, which was not conducive that impartially and calm deliberation essential to court of law, and violates due process of law under the 14th Amendment to the Federal Constitution.

WHEREFORE appellant prays for errors alleged and those presented under its petition for writ of certiorari to the Court of Criminal Appeals of the State of Texas, in all things be granted and on final hearing such final decree reverse the said State court and that its action affirming the trial court be reversed.

F. S. K. WHITTAKER,
J. P. ROGERS,
Attorneys for Appellant.

CARTER WESLEY,
Of Counsel.

FILE COPY

NO. 87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

BOB WHITE
Petitioner

v.

THE STATE OF TEXAS
Respondent

PETITION FOR REHEARING BY THE STATE OF TEXAS

GERALD C. MANN
Attorney General of Texas
GEO. W. BARCUS
Assistant Attorney General
LLOYD W. DAVIDSON
State Prosecuting Attorney
Austin, Texas

ATTORNEYS FOR THE STATE OF TEXAS.

FIRM FOUNDATION—AUSTIN

NO. 87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

BOB WHITE,
Petitioner

v.

THE STATE OF TEXAS
Respondent

PETITION FOR REHEARING BY THE STATE OF TEXAS

May it please the Court:

The State of Texas, respondent in the above cause, acting by and through Gerald C. Mann, its Attorney General, who resides at Austin, Texas, files this its petition for a rehearing herein of the order of this Court of March 25, 1940, and for such says:

1.

Heretofore, on the 25th day of March, 1940, this Honorable Court entered in this cause its order and judgment as follows:

(a) Granted petitioner permission to file a petition for rehearing.

(b) Granted petitioner's petition for a rehearing.

(c) Vacated the order entered in this cause on November 13, 1939.

(d) Granted petitioner the right to proceed in forma pauperis.

(e) Granted the petition for the writ of certiorari.

(f) Reversed the judgment of the Court of Criminal Appeals of Texas and of the trial court.

(g) Ordered the mandate to issue forthwith.

2.

The record before this Court reflects the history of this cause to be:

(a) Petitioner, Bob White, was convicted in the District Court of Montgomery County, Texas, of the capital offense of rape by assault, and his punishment was fixed at death.

(b) From this conviction, appeal was perfected to the Court of Criminal Appeals of Texas, being

the appellate court and court of last resort in criminal cases in said state, which judgment of conviction was in all things affirmed by the said Court of Criminal Appeals of Texas. The opinion affirming the judgment and overruling the motion for rehearing is reported in Vol. 128, Southwestern Reporter, 2nd Series, at Page 51, et. seq. The judgment of the Court of Criminal Appeals of Texas became final on May 17, 1939, when the motion for rehearing was overruled.

(c) On June 6, 1939, petitioner filed in this Honorable Court his petition for the writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas, asserting as grounds therefor race discrimination in the selection and organization of the grand jury which returned the bill of indictment against him and upon which his conviction was predicated.

(d) On November 13, 1939, this Honorable Court dismissed the petition for the writ of certiorari.

(e) On March 19, 1940, or 127 days thereafter, petitioner filed in this Court his petition for leave to file and his petition for a rehearing of the order of November 13, 1939, and either accompanied said petitions with, or made same as a part thereof, what he represented to be a supplemental transcript of the record and a copy of the statement of facts, as filed in and before the Court of Criminal Appeals of Texas.

Note: While counsel for the State of Texas have not seen these petitions, in view of the order of this Honorable Court we assert the fact to be that the petitions for leave to file and for rehearing urged, as a ground for the granting of the writ of certiorari and for the reversal of the cause and judgment of the Court of Criminal Appeals of Texas, a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in admitting in evidence against petitioner, upon the trial of the cause, a confession made by him confessing his guilt of the offense charged, and which confession petitioner charged was unlawfully coerced and forced from him against his will by those having him in custody as a prisoner.

(f) On March 25, 1940, or six days after the filing of the petitions last above referred to, this Honorable Court entered the orders heretofore referred to in Paragraph No. 1 hereof, and reversed the cause, by per curiam opinion, with no reason assigned or opinion delivered as the basis for such order save and except a reference to the case of *Chambers* v. *Florida*, No. 195, decided February 11, 1940, and *Canty* v. *Alabama*, No. 634, decided March 11, 1940.

Counsel for respondent recognize and construe such order and citations as sustaining petitioner's contention that the confession so introduced and used against him was obtained in violation of, and constituted a denial of, due process under the Four-

teenth Amendment to the Constitution of the United States.

(g) No representative of the State of Texas was given notice or notified of the filing of the petitions of March 19, 1940. No representative of the State of Texas was notified or given notice that the cause was set for submission or was to be submitted in this Court. No representative of the State of Texas was given the opportunity of being heard in opposition to the petitions so filed by the petitioner, nor to the petition for the writ of certiorari, nor to the petitioner's contentions relative to the admissibility or legality of the confession. In fact, the order of March 25, 1940, was entered without the State of Texas' being first granted the opportunity to be heard upon the issues and questions involved and decided in that order.

3.

Counsel for the State of Texas respectfully but earnestly insist that, under the facts as detailed, the order of this Honorable Court of March 25, 1940, was improvidently entered, as we know that the Court did not intend to overturn a judgment and decree of the court of last resort of our State, without first giving and granting to the State of Texas and its representatives the right and privilege of being heard and of having its day in court.

4.

We respectfully submit that the fact of no notice and no opportunity of being heard are alone sufficient reasons to warrant the State of Texas to ask a rehearing of this cause, to the end that an opportunity of discussing the issues and questions involved may be had.

In this connection, we respectfully submit that the following questions and issues are raised by this record, and upon which the State of Texas desires to be heard, viz.:

(a) The jurisdiction of this Honorable Court to grant the petitioner's petition for rehearing.

(b) The jurisdiction of this Honorable Court to grant the petition for the writ of certiorari.

(c) The jurisdiction of this Honorable Court to determine this cause.

(d) Whether the record reflects that a substantial federal question is raised for this Court's determination.

(e) Whether the record reflects that the decision of, and the disposition made of this cause by, the Court of Criminal Appeals of Texas was based or founded upon any substantial federal question as distinguished from an adequate state question.

(f) Whether the record reflects that in the Court of Criminal Appeals of Texas, in the submission and determination of this cause, there was drawn in question the validity of a statute of the State of Texas as being repugnant to the Constitution or Laws of the United States, and the decision of that court was in favor of the validity of the statute.

(g) Whether the record sustains, as a matter of fact, the conclusion of this Court that the petitioner's confession was obtained in violation of any provision of the Constitution or Laws of the United States.

(h) Whether the record reflects facts which bring this case within the rule announced by this Court in the case of *Chambers* v. *Florida*, 195, decided February 11, 1940.

(i) Whether the record reflects that the petitioner's confession was obtained or used against him in violation of the statutes of the State of Texas governing the giving, taking, or using of confessions in criminal cases in said state.

(j) Whether a confession made in conformity with the laws and applicable statutes of the State of Texas, governing the making and taking of confessions, and thereafter used by the prosecution upon the trial of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to

the Constitution of the United States, or any other provision thereof.

5.

It is the contention of the State of Texas, and we respectfully submit, that to each and all of the foregoing issues and questions a negative answer is required, warranted and authorized under rules of this Court and the Constitution and Laws of the United States and of the State of Texas.

In support of this contention, the State of Texas and its representatives desire to be heard, and to that end respectfully pray:

(a) That this petition for rehearing be granted.

(b) That the cause be regularly set for submission before this Honorable Court, with respondent accorded the right to file brief and to present oral argument in support of its respective contentions.

(c) That the question of this Court's jurisdiction be reserved and heard along with the case as a whole.

(d) That upon final hearing the petition for writ of certiorari be dismissed.

(e) That in the event this Court determines it has jurisdiction of the cause, then upon final hearing that the judgment of the Court of Criminal Ap-

peals of Texas in this cause be in all things affirmed, and that all orders of this Court heretofore made contrary to that conclusion be vacated and set aside.

(f) That the Court having granted petitioner the right to proceed herein in forma pauperis, the record be ordered printed in conformity therewith; or if denied, then that the record be printed at respondent's expense.

6.

Counsel for the State of Texas, respondent herein, hereby certify that this petition for rehearing is presented in good faith and not for delay.

We further certify that, in obedience to the order of this Court of March 25, 1940, and in order that no injury may be done petitioner pending the hearing and disposition of this petition for rehearing, the Court of Criminal Appeals of Texas did, on the 3rd day of April, 1940, make and enter the following order:

"No. 20,188.

"Bob White ..... Appellant.

"vs.

"The State of Texas, ... Appellee.

"ORDER.

"Whereas, on the 22d day of March, 1939 this Court made and entered in the above cause its judgment, order and decree in all things affirming the judgment of the trial court, and

"Whereas, on the 25th day of March, 1940, the Supreme Court of the United States granted the petition of the appellant for a writ of certiorari to review the judgment of this court, and did on the same day enter its judgment reversing the judgment of this court, and the mandate evidencing said order has been received by this court,

"It is therefore ordered and decreed that the execution of the judgment of this court aforesaid be and the same is hereby arrested and the mandate and all proceedings to enforce the judgment of this court and the trial court are hereby stayed until the further order of this court.

"The Clerk of the court is directed to forward to the Warden of the State Penitentiary at Huntsville, Texas, a copy of this order duly certified, for his observance.

"Entered this the 3d day of April, 1940.

"F. L. HAWKINS

"Presiding Judge, Court of Criminal Appeals of Texas."

We represent that J. P. Rogers, Esq., Attorney at Law, of Houston, Texas, is one of counsel for petitioner. We understand that there are other and additional counsel for petitioner, but the names and addresses of these are unknown to counsel for respondent. Their names and addresses are known to, or are on file with the record in the office of, the Clerk of this Court.

This petition for rehearing is in all things respectfully submitted.

GERALD C. MANN
Attorney General of Texas

GEO. W. BARCUS
Assistant Attorney General

LLOYD W. DAVIDSON
State Prosecuting Attorney
Austin, Texas

ATTORNEYS FOR THE STATE OF TEXAS.

SUPREME COURT OF THE UNITED STATES.

No. 87.—October Term, 1939.

Bob White, Petitioner,
vs.
The State of Texas.

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[May 27, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner was convicted of rape and sentenced to death in the District Court of Montgomery County, Texas. The State's appellate criminal court of last resort affirmed and denied rehearing.[1] We declined to grant certiorari to review the State court's action. February 29, 1940, petitioner sought rehearing of his petition for certiorari, alleging that his conviction and sentence resulted from proceedings in which the State had utilized an alleged confession in violation of the Due Process Clause of the Fourteenth Amendment. March 25, 1940, we granted certiorari, and reversed the judgment of the state court upon authority of *Chambers* v. *Florida*, — U. S. —, and *Canty* v. *Alabama*, *Id.*, —. The case is before us now on the State's petition for rehearing.[2]

From the first offer of the alleged confession in evidence at the trial, petitioner has challenged the State's right to utilize it con-

[1] 128 S. W. (2d) 51. A prior conviction was reversed. 117 S. W. (2d) 450.

[2] Petitioner's original petition for certiorari was denied November 13, 1939. On February 29, 1940, after our decision in the *Chambers* case, petitioner filed a petition for rehearing of his original petition, assigning the additional ground that his conviction was attributable to the use by the State of a confession obtained by coercion and intimidation. March 2, 1940, the Attorney General of Texas was notified of the pendency of the petition for rehearing and he has informed the Clerk of this Court that he notified the State's Appellate Criminal Attorney. Information of pendency of the petition for rehearing of the petition for certiorari was also communicated to the Montgomery County District Court Clerk, the District Attorney, the Governor and the State Board of Pardons and Paroles. The State's petition for rehearing of our judgment of March 25, 1940, reversing the State court's judgment, alleged that the State had not received adequate notice and sought further opportunity to present the State's views. We therefore heard oral arguments upon the State's petition for rehearing.

sistently with rights guaranteed him by the Federal Constitution.[3] In affirming the conviction and sentence of death, the court below necessarily determined that use of the confession did not constitute a denial of that due process which the Fourteenth Amendment guarantees.

The State suggests that there is evidence that petitioner denied ever having made or signed the confession which purported to be signed by his mark. Therefore, it insists that petitioner is barred from urging that the prosecution's use of the confession could have deprived him of due process at his trial. But regardless of petitioner's testimony on this question, the State insisted and offered testimony to establish that the confession was signed by him and upon this evidence the confession was submitted to the jury for the purpose of obtaining his conviction. Since, therefore, the confession was presented by the State to the jury as that of petitioner, we must determine whether the record shows that, if signed at all, the confession was obtained and used in such manner that petitioner's trial fell short of that procedural due process guaranteed by the Constitution.

Petitioner is an illiterate farmhand who was engaged, at the time of his arrest, upon a plantation about ten miles from Livingston, Texas. On the day following the crime with which he has been charged, he was called from the field in which he was picking cotton and was taken to the house of the brother-in-law of the prosecutrix, the victim of the crime, where fifteen or sixteen negroes of the vicinity were at the time in custody without warrants or the filing of charges. Taken to the county court house, and thence to the Polk County jail, petitioner was kept there six or seven days. According to his testimony, armed Texas Rangers on several successive nights took him handcuffed from the jail "up in the woods somewhere", whipped him, asked him each time about a confession and warned him not to speak to any one about the nightly trips to the woods. During the period of his arrest up to and including the

[3] In addition to alleging that the confession relied on by the State was coerced and involuntary, both petitioner's amended motion for a new trial and his bill of exceptions to the court below set out that he "was not permitted to talk to an attorney, to advise him but was kept incommunicado, was not permitted to use a telephone, was kept in the woods by Rangers a great portion of the time and was denied every right that even this defendant is entitled to under the Constitution of Texas and the Constitution of the United States."

igning of the alleged confession, petitioner had no lawyer, no harges were filed against him and he was out of touch with friends r relatives.

There were denials that petitioner was ever physically mis-reated or abused. But the Rangers and a local peace officer, identi-ied by petitioner as the officers who took him on the night trips to he woods and there whipped him, did not specifically deny that e was taken out of jail, at night, and interrogated in the woods. This local peace officer wasn't sure "how many times" the prisoner as removed from jail, and one Ranger re-stated his testimony given t the first trial that he "took him out so many times" the exact umber could not be recalled. The prisoner was taken out of jail, riven "out on the road" and then "out off of the road", as this anger testified, in order that the officers could talk to him and ecause the jail was crowded. In jail, the Sheriff put petitioner by imself and "kept watching him and talking to him."

Before carrying petitioner to Beaumont, where the alleged con-ession was taken, the Sheriff talked about an hour and a half with im. The Rangers who had been taking petitioner to the woods at ight knew the county attorney was going to Beaumont to get a tatement; they, too, went there and were in and out of the eighth loor room of the jail in Beaumont, with the elevator locked, where etitioner was interrogated from approximately 11:00 P. M. to 3:00 r 3:30 A. M. The alleged confession was reduced to writing after A. M. Immediately before it was taken down, the prisoner was epeatedly asked by the private prosecutor whether he was ready to onfess. Petitioner then began to cry, and the typing of the con-ession, upon which the State's case substantially rested, was com-leted by the county attorney about daylight. Two citizens of Beaumont signed it as witnesses.

"Due process of law, preserved for all by our Constitution, com-ands that no such practice as that disclosed by this record shall end any accused to his death."[4]

The State's petition for rehearing is denied.

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[4] Chambers v. Florida, — U. S. —, —; Canty v. Alabama, — U. S. —.